Digitized by the Internet Archive
in 2025

https://archive.org/details/compendiumoflawo0000hhug

KN 30 FRA

MIDDLE TEMPLE LIBRARY
WITHDRAWN STOCK

a 01721
B251 H2

A COMPENDIUM

OF

THE LAW OF TORTS

Specially adapted for the Use of Students

BY

HUGH FRASER, M.A., LL.D.,

OF THE INNER TEMPLE AND NORTHERN CIRCUIT, BARRISTER-AT-LAW

Reader in Common Law in the Inns of Court;

Author of

"Principles and Practice of the Law of Libel and Slander,"

and

"The Law of Parliamentary Elections and Election Petitions."

EIGHTH EDITION.

LONDON:

SWEET AND MAXWELL, LIMITED,

3, CHANCERY LANE.

1910.

PREFACE

TO THE EIGHTH EDITION.

In preparing the present edition for the press, the book has been thoroughly revised and brought up to date. I have made no alteration in the plan or general arrangement of the work, and have endeavoured, as far as possible, not materially to increase its size.

I have to thank my friend, Mr. Roland Burrows, LL.D., Barrister-at-Law, for much valuable assistance in the preparation of this edition, and also for the time and trouble he has kindly given to the revision of the proof-sheets.

H. F.

4, Elm Court, Temple, E.C.
July 21*st*, 1910.

EXTRACT FROM

PREFACE TO THE FIRST EDITION.

I am under an obligation to the Liverpool Board of Legal Studies to supply the students who attended my lectures at Liverpool with a printed analysis of the same. The idea that such an analysis might be of some use to other students has induced me to publish this little book, which professes to be nothing more than rough notes of the outlines of my lectures delivered at Liverpool and Newcastle-upon-Tyne in the early part of last year. It was compiled, in the first instance, with the object of assisting those of my own pupils who wished to enter upon the course of study which I indicated to them in my lectures; and in preparing my notes for the press I had that object solely in view. It is not intended to be used as a cram-book, nor do I imagine that a parrot's knowledge of its contents would enable any student, foolish enough to attempt to acquire it, to cheat a competent examiner into the belief that he had

properly studied the Law of Torts ; if, indeed, I had thought so, these pages would never have seen the light. I venture to hope, however, that it may prove of service as an inducement to study the Law of Torts in the reported cases and in the various works I have referred to, and may prove of value to those who wish to be directed to the best sources of information on this branch of the law.

H. F.

2, Cloisters, Temple, E.C.,
March 16*th*, 1888.

CONTENTS.

PAGE

PREFACE iii
TABLE OF CASES CITED ix
INDEX TO STATUTES CITED xxv
LIST OF ABBREVIATIONS xxix

CHAPTER I.

OF TORT IN GENERAL 1

CHAPTER II.

OF VARIATIONS IN THE NORMAL RIGHT TO SUE ARISING FROM PERSONAL DISABILITY . . . 5

CHAPTER III.

OF VARIATIONS IN THE NORMAL RIGHT TO SUE ARISING FROM THE EXISTENCE OF SPECIAL CIRCUMSTANCES 14

CHAPTER IV.

OF LIABILITY FOR THE WRONGS OF OTHERS . . 32

CHAPTER V.

OF WRONGS TO PROPERTY 67
A. WRONGS TO REAL PROPERTY . . . 67
B. WRONGS TO PERSONAL PROPERTY . . 98

CHAPTER VI.

PAGE

OF LOSS OF SERVICE, SEDUCTION, CONSPIRACY, AND MAINTENANCE 116

CHAPTER VII.

OF LIBEL AND SLANDER 125

CHAPTER VIII.

OF WRONGS TO THE PERSON 177
A. ASSAULT AND BATTERY 177
B. FALSE IMPRISONMENT 180
C. MALICIOUS PROSECUTION 182
D. MALICIOUS ARREST 186

CHAPTER IX.

OF WRONGS ARISING FROM FRAUD 187

CHAPTER X.

OF THE DUTY TO ABSTAIN FROM NEGLIGENCE, AND OF CERTAIN WIDER DUTIES IMPOSED IN SPECIAL CASES 201

CHAPTER XI.

OF CERTAIN MISCELLANEOUS MATTERS . . . 223

CHAPTER XII.

OF REMEDIES AND MEASURE OF DAMAGES RECOVERABLE 236

CHAPTER XIII.

OF LIMITATION OF ACTIONS 249

INDEX 253

TABLE OF CASES.

	PAGE
Aarons Reefs *v.* Twiss	190
Abergavenny *v.* Llandaff (Bp. of)	23
Abbot *v.* Macfie	213
Abrahams *v.* Deakin	36
Abram Coal Co. *v.* Southern	62
Abrath *v.* N. E. Rail. Co.	183
Acton *v.* Blundell	84
Adamson *v.* Jarvis	248
Admiral Fishing Co. *v.* Robinson	54
Agar-Ellis, In re	23
Agincourt, The	24
Alabaster *v.* Harness	123
Albert (Prince) *v.* Strange	111
Alcott *v.* Millar's Karri, &c. Co.	176
Allbutt *v.* Gen. Med. Council	19
Allen *v.* Flood	29, 120
Allen *v.* L. & S. W. Rail. Co.	37
Alton *v.* Midland Rail. Co.	228
Ambler *v.* Gordon	97
Ames *v.* Union Rail. Co.	229
Anderson *v.* Calvert	240
Anderson *v.* Fife Coal Co.	58
Anderson *v.* Gorrie	155
Anderson *v.* Oppenheimer	228
Andrew *v.* Failsworth	57
Andrews *v.* Andrews	55
Andrews *v.* Chapman	166
Andrews *v.* Mockford	194
Anglo-Algerian S.S. Co. *v.* Houlder	239
Anglo-American Oil Co. *v.* Manning	39
Angus *v.* Clifford	189
Angus *v.* Dalton	87
Ankerson *v.* Connelly	97
Annie, The	239
Anon.	243
Anslow *v.* Cannock Chase	62
Anthony *v.* M. Rail. Co.	208
Appleby *v.* Franklin	223, 224, 225, 226
Arkwright *v.* Gell	82, 83
Armitage *v.* Haley	242
Armitage *v.* Lancs. and Yorks. Rail.	59
Armory *v.* Delamirie	99
Arnold *v.* Bottomley	141
Ashby *v.* White	3
Assicurazioni, &c. de Trieste *v.* Empress, &c. Assn.	187
Astrakhan, The	241
Atkinson *v.* Newcastle Waterworks Co.	246
Attorney-General *v.* Conduit Colliery Co.	86
Attorney-General *v.* G. N. Rail. Co.	81
Attorney-General *v.* Tod Heatley	93
Attorney-General *v.* W. H. Smith & Son	91
Austin *v.* Culpepper	126, 129
Austin *v.* Dowling	185
Austin *v.* G. W. Rail. Co.	227
Auworth *v.* Johnson	89
Avis *v.* Newman	90
Back *v.* Stacey	97
Backhouse *v.* Bonomi	86, 251

PAGE
Baddeley *v.* Earl Granville 50
Baily *v.* Clark 82
Baker *v.* Bolton..... 228
Baker *v.* Carrick 166
Baker *v.* Snell ... 34, 219, 220, 221
Ball, Ex parte, In re Shepherd..... 223, 224, 226
Ballard *v.* Tomlinson 85
Bamford *v.* Goole & Co. ... 222
Bank of British North America *v.* Strong..... 153
Bank of England *v.* Cutler 33
Bank of New South Wales *v.* Owston 37
Bargewell *v.* Daniel 54
Barnes *v.* Dowling..... 90
Barnes U. D. C. *v.* L. G. O. Co. 208
Barnett *v.* Allen 132
Barratt *v.* Kearns 19, 155
Barrett *v.* Associated Newspapers, Ltd. 175
Barrow *v.* Lewellin 135
Bartlett *v.* Wells 7
Barwick *v.* English Joint Stock Bank ... 39, 198, 199
Bass *v.* Gregory..... 95
Baxter *v.* R. Mail, &c. Co.... 239
Baxter *v.* Taylor 68
Bayley *v.* Manchester, Sheffield and Lincolnshire Rail. Co. 36
Beatson *v.* Skene 159
Beauchamps *v.* Crofts 153
Beaumont *v.* Kaye 9
Beckham *v.* Drake 10
Beddall *v.* Maitland 72
Bedford *v.* McKowl 119
Bell *v.* Midland Rail. Co.... 240
Bender *v.* Zent 58
Bennett *v.* Alcott 118
Bernina, The..... 214
Beswick *v.* Smith 131, 133
Betjemann *v.* Betjemann... 72
Bird *v.* Holbrook 75
Bird *v.* Jones..... 180

PAGE
Birmingham Vinegar Co. *v.* Powell..... 115
Bishop *v.* Balkis Consolidated Co. 194
Bishop *v.* Latimer..... 141
Bishop of Winchester *v.* Knight 235
Black *v.* Christchurch Finance Co. 42
Black *v.* Merry 63
Black *v.* N. B. Rail. Co. ... 240
Blackburn *v.* Blackburn ... 137
Blackmore *v.* White..... 90
Blad's Case (Blad *v.* Bamfield) 247
Blades *v.* Higgs..... 178
Blake *v.* London C. C 20
Blake *v.* Midland Rail. Co. 232
Blake *v.* Stevens 137
Blyth *v.* Birmingham Waterworks Co. 203
Boag *v.* Lockwood Collieries 63
Bodlewell, The 239, 241
Bolch *v.* Smith 74
Bond *v.* Wilson..... 45
Bonnard *v.* Perryman...173, 243
Borlick *v.* Head..... 51
Bostock *v.* Ramsey U. D. C. 21
Bottomley *v.* Brougham ... 153
Boucau, The 204
Bourke *v.* Warren..... 127
Bourne's Case 128
Bowen *v.* Hall 117, 121
Bower *v.* Peate 42, 88
Bowyer *v.* Cook..... 74
Box *v.* Jubb 217
Boxsius *v.* Goblet Frères ... 135, 162
Boydell *v.* Jones 130
Bradford Corporation *v.* Ferrand 85
Bradford (Mayor) *v.* Pickles 29
Bradlaugh *v.* Newdegate... 123
Bremer, Re..... 110
Brenon *v.* Ridgway 147
Brice *r.* Lloyd 58, 59

PAGE
Bridges *v.* Hawkesworth... 99
Brighton Corpn. *v.* Packham..... 69
Britannic Merthyr Coal Co. *v.* David 46, 50
British, &c. Conveyors *v.* Lamson 123
British Mutual Banking Co. *v.* Charnwood, &c. Co.... 34, 199
British S. Africa Co. *v.* Campanhia de Moçambique 247
British S. Africa Co. *v.* De Beers 247
British United Shoe Co. *v.* Collier..... 110
Broderick *v.* London C. C. 56
Broggi *v.* Robins 93
Bromage *v.* Prosser 166
Broome *v.* Ritchie..... 128
Brown *v.* Hawkes 183
Browne *v.* Croome..... 163
Brunsden *v.* Humphrey ... 242
Brunswick (Duke) *v.* Hanover (King) 12
Bruxellesville, The 239
Bryant *v.* Lefevre..... 95
Burberrys *v.* Cording 114
Burchell *v.* Hickisson 77
Burgess *v.* Gray..... 41
Burley *v.* Baird 59
Burnard *v.* Haggis 7
Burns *v.* Manchester, &c. Mission 55
Burns, The..... 22
Buron *v.* Denman..... 16
Burr *v.* Smith 153
Burrows *v.* Lang 82
Burrows *v.* Rhodes 248
Bussy *v.* Amalgamated Society of Railway Servants 13, 123
Butler *v.* Hunter 43
Butterfield *v.* Forrester ... 210
Butterly Co. *v.* New Hucknall, &c. Co. 86

PAGE
Byrne *v.* Boadle..... 208

Cable *v.* Bryant..... 95
Caird *v.* Sime..... 112
Caledonian Ry. *v.* Mulholland..... 203
California, &c. Co., Re 112
Cameron *v.* Kyte 18
Cameron *v.* Young..... 205
Campbell *v.* Spottiswoode 129, 139, 144, 146, 147, 149
C. P. Ry. *v.* Peake..... 26
C. P. Ry. *v.* Roy 25
Capell *v.* Powell..... 8
Capital and Counties Bank *v.* Henty ...131, 133, 134, 165
Carpue *v.* L. & B. Rail. Co. 207
Carr *v.* Fracis Times & Co. 15, 247
Carrol *v.* Bird..... 180
Carstairs *v.* Taylor..... 218
Carter *v.* Drysdale..... 52
Carter *v.* Thomas 31
Cartwright, In re 90
Casella, In re..... 112
Cash *v.* Cash 115
Cavalier *v.* Pope..... 205
Challis *v.* L. & S. W. Ry. 57
Chamberlain *v.* Williamson 230
Chambers *v.* Goldthorpe ... 19
Chang, Ex parte..... 23
Chapronière *v.* Mason 208
Charing Cross, &c. Rail. Co. *v.* Boots 62
Chasemore *v.* Richards... 3, 30, 81, 84
Chastey *v.* Ackland 95
Chattell *v.* Daily Mail 242
Chatterton *v.* Secretary of State for India in Council 157
Cheshire *v.* Bailey..... 38
Chesterfield *v.* Harris 87
Ching *v.* Surrey C. C. ... 78
Churchill *v.* Gedney..... 132
Churchill *v.* Hunt..... 130

PAGE
Citizens' Life Assurance Co. v. Brown..... 11, 140, 184
City of London Brewery Co. v. Tennant..... 95
Clark v. A. & N., &c. Society 191, 222
Clark v. Chambers 213
Clark v. Freeman 243
Clark v. L. G. O. Co. ...229, 232
Clark v. Molyneux..... 150
Clark v. Newsam 240
Clark v. Woods..... 20
Clarke v. West Ham Corporation 205, 239
Clarkson v. Lawson 142
Clay v. Roberts 130
Cleary v. Booth..... 23
Clegg, Parkinson & Co. v. Earby Gas Co. 246
Clement v. Lewis 142
Cleverley v. Gas Light and Coke Co..... 57
Clissold v. Crutchley 71
Clover v. Hughes 56
Cobb v. G. W. Rail. Co. ... 239
Coghlan, Re 130
Cohen v. Seabrook..... 66
Coldrick v. Partridge 46
Cole v. Christie 208
Coleman v. West Hartlepool Harbour, &c. Co. ... 174
Coles v. Turner 175
Collard v. Marshall 173
Colls v. Home & Colonial Stores 97
Colonial Bank v. Marshall 203
Comerford v. Britannic Assurance Co. 34
Compton-Smith v. L. & S. W. Rail. Co. 36
Concaris v. Duncan 176
Consolidated Co. v. Curtis 101
Conway v. Wade 122, 123
Cook v. Sprigg 16
Cook v. Ward.....130, 137
Cooke v. Midland G. W. Rail. Co. 78, 213
PAGE
Cooper v. Willomatt..... 102
Cooper and Crane v. Wright 44
Cope v. Sharp 31, 69
Corby v. Hill..... 77
Corea v. Peiris 183
Corelli v. Wall 130, 173
Cornfoot v. Fowke..... 197
Cornford v. Carlton Bank... 11, 184
Cotton v. Wood..... 207
Coulson v. Coulson 173
Coupé Co. v. Maddick 36
Coward v. Wellington 164
Cox v. Burbidge 211, 218
Cox v. Cooper..... 130
Cox v. English, &c. Bank... 184
Cox v. Feeney 149
Cox v. Lee 129
Craig v. Dowding 111
Craske v. Wigan 59
Creed v. Fisher 292
Cremin v. Guest..... 58
Cribb v. Kynoch 65
Cripps v. Judge..... 48
Crossfield, Re..... 112
Crotch v. Arnold 114
Cuenod v. Leslie 8, 9
Cullen v. Thompson's Trustees 32
Cundy v. Lindsay..... 105
Cundey v. Lerwill..... 115
Currie v. Walter..... 157
Curtis v. Black 57

Daines v. Hartley 132
Dakhyl v. Labouchere ... 144, 147, 150
Dale v. Wood..... 31
Dalton v. S. E. Rail. Co.... 232
Darley Main Colliery Co. v. Mitchell 251
Davey v. L. & S. W. Rail. Co. 211
Davidson v. Hill 233
Davies v. Davies 90
Davies v. Mann..... 211

PAGE
Davies *v.* Snead..... 159
Davies *v.* Williams 119
Davis *v.* Bromley Corporation 29
Davis *v.* Reeves 162
Davis & Son *v.* Shepstone... 148
Dawkins *v.* Antrobus..... 23
Dawkins *v.* Lord Paulet ... 157
Dawkins *v.* Lord Rokeby ... 19, 157
Dawkins *v.* Prince Edward of Saxe-Weimar..... 19
Degg *v.* Midland Rail. Co. 46
De la Bere *v.* Pearson 203
Delacroix *v.* Thevenot 135
Denaby, &c. Collieries *v.* Anson 69
Denaby, &c. Collieries *v.* Yorkshire Miners' Association 36
Denton *v.* G. N. Rail. Co. 199, 226
Derry *v.* Peek.....187, 188, 192
Deschamps *v.* Miller..... 247
Devitt *v.* Bainbridge S.S. 63
De Wahl *v.* Braune 5
Dewhurst *v.* Mather..... 54
Dibden *v.* Skirrow 4
Dibdin *v.* Swan and Bostock 149
Dickinson *v.* N. E. Rail. Co. 232
Dicks *v.* Yates 114
Dickson *v.* Reuter's Telegraph Co. 191
Dixon *v.* Bell..... 222
Dixon *v.* Metropolitan Board of Works 218
Dixon *v.* Smith..... 161
Dobell *v.* Stevens 195
Doggett *v.* Waterloo Taxi Cab Co. 40
Dominion National Gas Co. *v.* Collins 208, 222
Donelly *v.* Baird 64
Donoghue *v.* Hayes 137
Donovan *v.* Laing, &c. Syndicate 40
Dothie *v.* MacAndrew 62

PAGE
Doughty *v.* Firbank 49
Dover *v.* Bernstein 108
Drury *v.* N. E. Rail. Co. ... 210
Duck *v.* Mayeu 247, 248
Duckworth *v.* Johnson..... 232
Dudden *v.* Guardians of Clutton Union 82
Duke of Brunswick *v.* King of Hanover..... 12
Dulieu *v.* White & Sons ... 202
Duncan, In re, Terry *v.* Sweeting..... 235
Duncombe *v.* Daniell 166
Dunham *v.* Clare 56
Dunne *v.* Anderson 149
Duplany *v.* Davis 149
Dutch West India Co. *v.* Henriques 5
Dyer *v.* Munday 180

E. I. Rail. Co. *v.* Kalidas Mukarjee 207
Earl *v.* Lubbock 203
Earle *v.* Kingscote..... 7, 9
E. Fremantle Corporation *v.* Annois 24
E. London Harbour Board *v.* Caledonia, &c. Co. ...34, 40
Eastern and S. A. Telegraph Co. *v.* Capetown Tramways Co. 216
Eastwood *v.* Holmes..... 127
Eaton *v.* Johns 129
Eaves *v.* Blaenclydach Colliery Co. 62
Ecclesiastical Commissioners *v.* Kino 98
Edge *v.* Niccolls..... 115
Edgington *v.* Fitzmaurice 190
Edmondson *v.* Birch ...136 162
Edwards *v.* L. & N. W. Rail. Co..... 37
Edwards *v.* Midland Rail. Co. 184
Edwick *v.* Hawkes 72

	PAGE
Egyptian, The	39, 239
Elliott, Ex parte	226
Elliott *v.* Crutchley	114
Elliott *v.* Expansion of Trade	114
Ellis *v.* Sheffield Gas Consumers' Co.	41
Emblen *v.* Myers	240
Embry *v.* Owen	81
Emmens *v.* Pottle	239
Englehart *v.* Farrant	38, 201
Englishman, The, and The Australia	248
Evans *v.* Vickers	62
Evans *v.* Walton	116
Eyre *v.* Garlick	126
Eyre *v.* Houghton Main Colliery	61
Falvey *v.* Stanford	242
Farquharson *v.* King	39
Farrant *v.* Barnes	222
Fear *v.* Morgan	96
Fenton *v.* Thorley	57
Fergusson *v.* Malvern U. D. C.	85
Fernandez, Ex parte	18
Fetter *v.* Beale	243
Fielden *v.* Morley	22
Filburn *v.* People's Palace and Aquarium Co.	220
Filliter *v.* Phippard	221
Finburgh *v.* Moss Empires	140
Finlay *v.* Chirney	230
Fitzgerald *v.* Clark	59
Fitzhardinge *v.* Purcell	69
Fitzsimmons *v.* Duncan	150
Fletcher *v.* Rylands	216
Flight *v.* Lemon	123
Flight *v.* Thomas	96
Forbes *v.* King	130
Fordham *v.* L. B. & S. C. Rail. Co.	210
Foulkes *v.* Met. Dist. Rail. Co.	227
Fowler *v.* Homer	162
Fowlers *v.* Walker	98
Franklin *v.* S. E. Rail. Co.	232
Fraser *v.* Berkeley	149
Frost *v.* London J. S. Bk.	131
Fulton *v.* Norton	3
Furniss *v.* Cambridge Daily News	167
Gallagher *v.* Humphrey	77
Gane *v.* Norton Hill Co.	58
Gardner *v.* Slade	160
Gaskell and Walters, In re	6
Gautret *v.* Egerton	77
Gawley *v.* Belfast Corporation	22
Geddis *v.* Proprietors of Bann Reservoir	24
Geipel, Re	109
George *v.* Glasgow Coal Co.	63
George *v.* Skivington	222
George and Richard, The	232
Gestetener, Re	112
Gibbs *v.* Guild	72, 250
Giblan *v.* National Labourers' Union	120, 121
Gibson *v.* Dunkerley	66
Gibson *v.* Wells	90
Gilbert *v.* Nizam	59
Gillette *v.* Gamage	109
Gilroy *v.* Mackie	55, 62
Glasier *v.* Rolls	192
Glenwood Lumber Co. *v.* Phillips	99
Gloucester Grammar School Case, The	3, 29
Glynn *v.* Howell	69, 251
Goff *v.* G. N. Rail. Co.	37
Gomersall *v.* Davies	135
Gordon *v.* Commissioner of Police	4
Gordon *v.* Street	105
Gorris *v.* Scott	246
Gough *v.* Farr	242
Gould *v.* Birkenhead	211
Grainger *v.* Hill	180

PAGE
Grand Junction Canal Co. v. Shugar 86
Grant v. Glasgow and S. W. Ry. 58
Grant v. Thompson 82, 123
Gray v. Allison 23
Greatrex v. Hayward 82
Green v. Chapman 149
Green v. Howell 23
Greenwell v. Howell..... 20
Greenwood v. Hornsey...98, 244
Greig v. National Union of Shop Assistants..... 123
Griffiths v. Dudley (Lord) 52
Groves v. Wimborne..... 246
Gunter v. James 24, 94, 221
Gutta Percha Co, Re 113
Gwinnell v. Eamer 93

Hadley v. Baxendale 237
Hadwell v. Righton ...211, 219
Hague v. Doncaster 20
Hales v. Kerr..... 206
Halley, The 246
Hambleton v. Veere..... 243
Hambro v. Burnand..... 35
Hamer v. Knowles 86
Hamilton v. Long..... 119
Hammack v. White 207
Hammersmith Rail. Co. v. Brand 25, 27
Hammond v. Bussey 237
Hanson v. Waller..... 36
Hapelman v. Poole 59
Hardaker v. Idle District Council 42
Hardcastle v. S. Yorks. Rail. Co..... 77
Hargreave v. Spink & Son 104
Harnett v. Maitland..... 90
Harrington v. Derby..... 20
Harris v. Brisco..... 123
Harris v. De Pinna 95
Harris v. Perry 78
Harrison v. Duke of Rutland 69
PAGE
Harrison v. Southwark and Vauxhall Water Co. ...25, 93
Harrold v. Watney 212
Hartley v. Rochdale Corporation 27, 209
Harvey v. Young 190
Hatschek, Re..... 110
Haylett v. Vigor 57
Hayman v. Governors of Rugby School 23
Hayn v. Culliford..... 229
Heath v. Brighton Corporation 92
Heaton v. Goldney 131
Heaven v. Pender 78, 79
Hebditch v. McIlwaine... 158, 159
Hedges v. Tagg 118
Hedley v. Barlow 148
Hellwig v. Mitchell 138
Henwood v. Harrison 149
Heske v. Samuelson..... 47
Hewlett v. L. C. C. 21
Hewitt v. Duchess S.S. ... 59
Hickman v. Massey 69
Hicks v. Faulkner 183, 185
Higgins v. Betts 97
Higgins v. Searle 211, 219
Hill v. Begg 54
Hillyer v. St. Bartholomew's Hospital 33, 40
Hindle v. Brown 33
Hoare v. Silverlock 130
Hobbs v. L. & S. W. Ry.... 237
Hodgson v. Scarlett..... 154
Hodgson v. Sidney 10
Hodgson v. West Stanley Colliery 60
Hodson v. Pare 156
Holden v. Thompson 123
Hole v. Sittingbourne Rail. Co. 43
Holker v. Porrit 82
Holland v. Manchester and Liverpool Bank..... 203
Holliday v. National Telephone Co. 42

PAGE

Hollins *v.* Fowler 101
Holmes *v.* Mather..... 204
Holmes *v.* Wilson..... 243
Holsworthy U. D. C. *v.* Holsworthy R. D. C. ... 22
Hope *v.* I'Anson 22
Hope *v.* Leng 156, 167
Horsefall *v.* Thomas..... 195
Houlden *v.* Smith 19, 155
Houldsworth *v.* City of Glasgow Bank 39
Hounsell *v.* Smyth 77
Howe *v.* Oliver 247
Hubbuck *v.* Wilkinson ...175, 176
Huckle *v.* London C. C. ... 66
Huggett *v.* Myers..... 80
Hughes *v.* Coed Talon Colliery Co. 64
Hughes *v.* Percival.....42, 88
Hulton *v.* Jones..... 127
Hume *v.* Marshall..... 161
Hume *v.* Oldacre 247
Humphreys *v.* Stillwell ... 166
Humphries *v.* Brogden..... 86
Hunt *v.* G. N. Rail. Co....161, 165
Hunt *v.* Star Newspaper Co. 144, 145
Huntley *v.* Ward 137
Hydraulic Engineering Co. *v.* McHaffie..... 238
Hyman *v.* van den Bergh 96

Ilott *v.* Wilkes 75
Imperial Japanese Govt. *v.* P. & O. Co..... 12
Indermaur *v.* Dames..... 78
India (Secy.) *v.* Kamachee... 15
Ingram *v.* Lawson..... 129
Ismay *v.* Williamson 56
Ivay *v.* Hedges 77

Jackson *v.* Watson 229
James *v.* Institute of Chartered Accountants..... 23
James *v.* Redditch..... 128
Janson *v.* Driefontein Mines 3, 5
Jassy, The 12
Jennings *v.* Rundall 6
Jenoure *v.* Delmege 150
Joel *v.* Morrison 38
Johannesburg, The 21
Johnson, Re 110
Johnson (No. 2), Re..... 110
Johnson *v.* Diprose 99
Johnson *v.* Lindsay 40
Johnston *v.* Consumers' Gas Co. 246
Johnston *v.* Monasterevan General Store 54
Jolly *v.* Kine 97
Jones *v.* Chappell 89
Jones *v.* Festiniog Rail. Co. 221
Jones *v.* Financial Times... 152
Jones *v.* Foley 72
Jones *v.* Hulton..... 127
Jones *v.* Mayor of Liverpool..... 40
Jones *v.* Powell 94
Jones *v.* Pritchard..... 95
Jones *v.* Scullard 40
Jordeson *v.* Sutton Gas Co. 86, 244
José *v.* Metallic Roofing Co. 121
Joynt *v.* Cycle Trade Publishing Co. 147, 148

Kearney *v.* L. B. & S. C. Rail. Co..... 208
Keates *v.* Cadogan (Lord) 191
Keeble *v.* Hickeringill..... 30
Keighley *v.* Durant 32
Kelly *v.* Metropolitan Rail. Co. 228
Kelly *v.* Sherlock 149
Kelly *v.* Tinling..... 149
Kendillon *v.* Maltby..... 238
Kent *v.* Courage & Co....11, 184
Kent C. C. *v.* Folkestone... 22

PAGE
Kilpatrick *v.* Wemyss Coal Co. 65
Kimber *v.* The Press Association 167
King *v.* Met. Dist. Rail. Co. 181
Kings Norton Metal Co. *v.* Edridge 105
King of Spain *v.* Hullett... 12
Klaber, Re..... 109
Kœnig *v.* Ritchie 164

Labouchere *v.* Wharncliffe 23
Lambert *v.* G. E. Rail. Co. 34, 181
Lampson *v.* Staveley 87
Lane *v.* Cox 79, 203
Langridge *v.* Levy 194, 222
Larkin *v.* Belfast Harbour Commissioners 70
Laughton *v.* Bishop of Sodor and Man..... 164
Law *v.* Llewelyn 155
Lawrence *v.* Newberry..... 127
Lecouturier *v.* Rey 113
Leddell *v.* McDougal 193
Le Fanu *v.* Malcolmson ... 128
Lefroy *v.* Burnside 148
Leishman *v.* Dixon 63
Le Lièvre *v.* Gould ... 187, 203
Lemaitre *v.* Davis..... 88
Lemmon *v.* Webb..... 91
Lemprière *v.* Lange 7
Leon *v.* Edinburgh Evening News 131
Levene *v.* Brougham..... 7
Lever *v.* Pontypridd U.D.C. 208
Levi *v.* Milne..... 128
Lewis *v.* Levy..... 167, 168
Lewis *v.* Ronald..... 80
Lewis *v.* Walter..... 143
Lilley *v.* Roney..... 153
Limpus *v.* London General Omnibus Co. 34, 35, 38
Lindsay Petroleum Co. *v.* Hurd 190

PAGE
Linford *v.* Lake..... 240
Linotype Co. *v.* British, &c., Co. 129
Liverpool Adelphi Loan Assoc. *v.* Fairhurst 8
Liverpool S.S. Co. *v.* Mersey Trading Co. 27
Lodge Holes Colliery Co. *v.* Wednesbury Corporation 241
L. B. & S. C. Rail. Co. *v.* Truman 25, 27
London (Mayor) *v.* Cox ... 20
London & N. W. Rail. Co. *v.* Bradley 24
L. T. & S. Rail. Co., Re ... 239
Long *v.* Sheffield Coal Co. 58
Longman *v.* Bath 203
Lord Beauchamps *v.* Sir R. Croft 153
Lovery *v.* Walker 74, 220
Low *v.* Bouverie..... 192
Low *v.* General Steam Fishing Co..... 59
Lowe *v.* Fox 249
Ludgater *v.* Love 197
Lumley *v.* Gye ... 116, 117, 121
Lyde *v.* Barnard 194
Lygo *v.* Newbold 212
Lyles *v.* Southend Corporation..... 20
Lynch *v.* Knight 238
Lynch *v.* Nurdin 212
Lyne, Ex parte 182
Lyne *v.* Nichols..... 175, 176

Mabe *v.* Connor..... 112
Macbeth *v.* Chislett 47
Macdougall *v.* Knight 167
Machado *v.* Fontes 247
Macintosh *v.* Dun 159
Mackay *v.* Reid..... 64
Mackay *v.* Rose..... 65
Mackett *v.* Commissioners of Herne Bay..... 174
Macleod *v.* Wakley ... 145, 146

PAGE
Macmillan *v.* Dent 111
Magdalena Steam Nav. Co. *v.* Martin 12
Magnolia Metal Co., Re ... 112
Major *v.* Franklin..... 112
Malachy *v.* Soper 129, 175
Malcolm *v.* Waterhouse...34, 38
Maleverer *v.* Spink 31
Malone *v.* Cayzer 56
Manchester (Mayor) *v.* Williams 140
Mangan *v.* Atterton 213
Mangena *v.* Lloyd..... 152
Mangena *v.* Wright 141, 148, 152
Mann *v.* Pinhorn 156
Mansell *v.* Griffin 23
Mansell *v.* Valley Printing Co. 111
Manzoni *v.* Douglas 204
Mapey *v.* Baker..... 163
Marais *v.* General Officer Commanding..... 17
Marks *v.* Caine 55
Marks *v.* Frogley 157
Marney *v.* Scott..... 80
Marsh *v.* Joseph 34
Marshall *v.* Orient S. N. Co. 64
Marshall *v.* White Rose S.S. 58
Marshall *v.* York, Newcastle, &c. Rail. Co....227, 228
M. Moxham, The 247
Masper *v.* Brown 179
Masters *v.* Burgess..... 161
Maund *v.* Monmouthshire Canal Co. 11
Maunder *v.* Venn 118
Maxwell *v.* British Thomson-Houston Co. 42
May *v.* Burdett 220
May *v.* Stoop 93
Mayfair Property Co. *v.* Johnston..... 68
Mayor of Bradford *v.* Pickles 29
Mayor of London *v.* Cox ... 20
PAGE
Mayor, &c. of Manchester *v.* Williams..... 140
McCallum, In re 250
McCallum *v.* Quinn 62
McCartney *v.* L. & L. S. Rail. Co..... 81
McDonald *v.* Banana S.S. 58
McDowall *v.* G. W. Rail. Co.....201, 238
McGlennon, Re..... 113
McInnes *v.* Dunsmuir 56
McKenzie *v.* Hardinge 119
McKie *v.* Stein 62
McLean *v.* Moss Bay Iron, &c. Co..... 60
McPherson *v.* Daniels 139
McQuire *v.* Western Morning News.....144, 147, 149
Mellors *v.* Shaw..... 45
Membery *v.* G. W. Rail. Co. 50
Merest *v.* Harvey 237, 240
Merivale *v.* Carson 144, 145, 149
Merryweather *v.* Nixan ... 248
Metropolitan Asylums Board *v.* Hill 27
Metropolitan Rail. Co. *v.* Jackson 206
Meux *v.* Cobley 89
Meux *v.* G. E. Rail. Co. ... 228
Mgomini, Ex parte 17
Michael *v.* Spiers & Pond... 138
Midland Ins. Co. *v.* Smith 223, 224, 225
Midland Rail. Co. *v.* Sharpe 62
Mighell *v.* Sultan of Johore 12
Milissich *v.* Lloyds 167
Miller *v.* David 138
Miller *v.* Hancock..... 79
Miller *v.* Race 102
Mills *v.* Armstrong 214
Mogul Steamship Co. *v.* M'Gregor, Gow & Co. ... 29, 30, 120, 121, 172
Monson *v.* Tussauds, Limited 126, 172, 173

	PAGE
Montgomery *v.* Haddington	22
Moore *v.* Manchester Liners	59
Morgan *v.* Lingen	129
Morgan *v.* Steble	10
Morgan *v.* Zenaida S.S.	56
Morris *v.* Carnarvon C. C.	78
Morrison *v.* Belcher	149
Moss *v.* G. E. Rail. Co.	63
Moss *v.* Hancock	103
Mostyn *v.* Atherton	82
Mostyn *v.* Fabrigas	18
Moyle *v.* Jenkins	51
M'Pherson *v.* Daniels	139
Mulholland *v.* Whitehaven Colliery Co.	64
Mullen *v.* Stewart	59
Mulrooney *v.* Todd	55
Munday *v.* Thames Ironworks Co.	52
Munster *v.* Lamb	153, 154
Murdoch *v.* Funduklian	160
Murphy *v.* Enniscorthy Guardians	55
Musgrave *v.* Pulido	18
National Exchange *v.* Drew	198
National Phonograph Co. *v.* Edison Bell Co.	32, 121
Neilson *v.* Horniman	109
Nelson *v.* Liverpool Brewery Co.	93
Netherlands S. African Rail. Co. *v.* Fisher	5
Neuwith *v.* Over Darwen Society	203
Nevill *v.* Fine Art and General Insurance Co.	131
New Moss Colliery Co. *v.* Manchester Corporation	86
New York Breweries *v.* Attorney-General	101
Nichols *v.* Marsland	217
Nitro-Phosphate Co. *v.* London and St. Kath. Docks Co.	218
Noden *v.* Johnson	179
Notting Hill, The	238
Nugent *v.* Smith	217
O'Brien *v.* Clement	127
Odell *v.* Cleveland House	42
Offin *v.* Rochford R. D. C.	20
Oliver *v.* Nautilus S.S.	66
O'Neill *v.* Everest	79
Ormerod *v.* Todmorden	81
Orrell Colliery Co. *v.* Schofield	60
Osborn *v.* Gillett	224, 229
Osborn *v.* M. W. B.	209
Osborne *v.* Jackson	48
Owen *v.* Faversham Corporation	92
Page *v.* Burtwell	66
Palmer *v.* Bateman	93
Palmer *v.* Fletcher	95
Palmer *v.* Wick	248
Pankhurst *v.* Hamilton	149
Panton *v.* Williams	185
Pappa *v.* Rose	19
Paris *v.* Levy	155
Parker *v.* L. G. O. Co.	207
Parlement Belge, The	12
Parry, In re	90
Pasley *v.* Freeman	3, 193, 195
Paterson *v.* Moore	62
Patterson *v.* Gas Light and Coke Co.	108
Pattison *v.* Jones	160
Pearson *v.* Dublin	22, 187, 200
Pechell *v.* Watson	123
Peek *v.* Gurney	189, 192, 194, 235
Peggie *v.* Wemyss Coal Co.	65
Penn *v.* Spiers & Pond	61
Penny *v.* Wimbledon U. D. C.	42, 43
Peru (Republic) *v.* Weguelin	12
Perry *v.* Fitzhowe	91
Perry *v.* Wright	61
Perryman *v.* Lister	184

PAGE

Philip *v.* Pennell 111
Phillips *v.* Eyre..... 18
Phillips *v.* Homfray 235
Phillips *v.* L. & S. W. Rail. Co. 241
Phipps *v.* New Claridge's Hotel 208
Pickering *v.* Dowson 190
Piggott *v.* Middlesex C. C. 24
Pittard *v.* Oliver 163
Polhill *v.* Walter 192
Polley *v.* Fordham 20
Polsue *v.* Rushmer 93
Pomfret *v.* Lancs. & Yorks. Ry. 58
Ponting *v.* Noakes 75
Pope *v.* Curl 111
Pope *v.* Outram 167
Popplewell *v.* Hodkinson... 87
Port Glasgow Sailcloth Co. *v.* Caledonian Rail. Co.... 25
Porton *v.* Central (Unemployed) Body for London 55
Portsmouth W. W. Co. *v.* L. B. & S. C. Rail. Co.... 81
Postlethwaite *v.* Parkes ... 117
Poulton *v.* L. & S. W. Rail. Co. 35
Powell *v.* Fall 221
Powell *v.* Thorndike..... 80
Powys *v.* Blagrave..... 90
Praed *v.* Graham 242
Presland *v.* Bingham 98
Prett *v.* Bickmore..... 93
Price *v.* L. C. C..... 26, 92
Priestley *v.* Fowler 45
Prince Albest *v.* Strange ... 111
Pullman *v.* Hill & Co. 135, 136, 157, 158, 159
Purcell *v.* Sowler 149

Quarman *v.* Burnett..... 40
Quartz Hill, &c. Co. *v.* Beall 166, 172
Quinn *v.* Leathem..... 29, 120, 121, 122
Quinn *v.* Pratt 19

PAGE

Radcliffe *v.* Pacific Steam Navigation Co. 62
Raleigh *v.* Goschen 17
Ralston, Re 109
Ramskill *v.* Edwards 248
Randall *v.* Newson 206
Rapley *v.* London Tramways Co..... 27
Ratcliffe *v.* Evans 175, 238
Rayner *v.* Mitchell..... 38
Rayson *v.* South London Tramways Co. 11, 184
Read *v.* Friendly Society of Operative Stonemasons... 120
Readhead *v.* Midland Rail. Co. 205
Reddaway *v.* Banham 114
Reddie *v.* Scoolt..... 119
Redgrave *v.* Hurd 195
Red Man's Syndicate *v.* Associated Newspapers... 236
Reece *v.* Taylor 31
Reed *v.* G. W. Rail. Co. ... 59
Reed *v.* Nutt 179
Reedie *v.* L. & N. W. Rail. Co. 41
Rees *v.* de Bernardy..... 124
Reese River Silver Mining Co. *v.* Smith 191
Refuge Assurance Co. *v.* Kettlewell 34, 39, 187
Reg. *v.* Coney..... 30
Reg. *v.* Labouchere 143
Reg. *v.* Lord Mayor of London 10
Reg. *v.* Morris 179
Reg. *v.* Train..... 94
Reg. *v.* Veley..... 164
Rennie *v.* Reid 54
Republic of Costa Rica *v.* Erlanger..... 12
Republic of Peru *v.* Weguelin 12
Rex *v.* Abingdon 152
Rex *v.* Carter..... 20
Rex *v.* Clerk 128
Rex *v.* Creevey 152

PAGE
Rex *v.* Crewe (Earl) 17
Rex *v.* Darby..... 128
Rex *v.* Davies 168
Rex *v.* Elliott..... 104
Rex *v.* Meade..... 12
Rex *v.* Pease 24
Rex *v.* Skinner 154
Rex *v.* Solomons 40
Rex *v.* White 148
Rhodes *v.* Soothill Colliery Co. 64
Rice *v.* Swansea Vale 58
Richards *v.* Bartrum..... 13
Richardson *v.* Mellish 243
Richardson *v.* Metropolitan Rail. Co..... 210
Riding *v.* Smith 238
Rigby *v.* Bennett 87
Riley *v.* Halifax Corporation..... 244
Ritchie *v.* Sexton 132
River Wear Commissioners *v.* Adamson..... 29
Roach *v.* Garvan 127
Roberts *v.* Brown 148
Roberts *v.* Taylor 31
Robertson *v.* Allen..... 59
Robinson *v.* Balmain New Ferry Co. 182
Robinson *v.* Jones..... 136
Robinson *v.* L. G. O. Co.... 93
Robshaw *v.* Smith..... 159
Roger *v.* Cochrane..... 109
Rogers *v.* Clifton 160
Rolls *v.* Isaacs 108
Roope *v.* D'Avigdor 225
Rose *v.* Buckett 10
Rosenbaum *v.* Metr. Water Board 209
Rowland *v.* Wright 58
Royal Aquarium Co. *v.* Parkinson 153, 155, 156
Royal Baking Powder Co. *v.* Wright 175
Royal Worcester Co., *Re*... 113
Ruddiman *v.* Smith 38
Rumbold *v.* L. C. C..... 210

PAGE
Rumney *v.* Walter 167
Russell *v.* Webster ... 134, 149
Rylands *v.* Fletcher 216

Sadler *v.* Henlock..... 40
Sadler *v.* South Staffordshire, &c. Co.....25, 221
St. Helens Smelting Co. *v.* Tipping 92, 194
Salaman *v.* Secretary for India 16
Salisbury *v.* Gould 20
Salomons *v.* Knight 172
Salvin *v.* N. Brancepeth Co. 94
Sanderson *v.* Collins..... 36, 38
Sands *v.* Child 16
Sapwell *v.* Bass..... 238
Sarson *v.* Roberts 191
Saxby *v.* Easterbrook...172, 243
Saxlehner *v.* Apollinaris Co. 114
Scarl *v.* Dixon 161
Schneider *v.* Heath 190
Schofield *v.* Bolton Corporation 213
Schogeld *v.* Lord Londesborough 203
Scott *v.* London Dock Co.... 208
Scott *v.* N. S. P. C. C. 123
Scott *v.* Pape..... 98
Scott *v.* Shepherd.....31, 201
Scott *v.* Stansfield..... 18, 155
Scottish Union, &c. Co. *v.* Scottish National, &c. Co. 114
Seaman *v.* Netherclift 154
Searles *v.* Scarlett..... 152
Secretary for India *v.* Kamachee Boye Sahaba 15
Seroka *v.* Kattenburg 9
Sewell *v.* N. T. Co. 182
Seymour *v.* Greenwood..... 34
Sharp *v.* Powell..... 201
Sharp *v.* Skues 135
Sheerin *v.* Clayton 56
Sheffield Corporation *v.* Barclay 33

PAGE

Shelfer *v.* City of London, &c. Co. 244
Shepheard *v.* Whittaker ... 137
Shepherd, Re 223, 226
Sherwell *v.* Alton U. D. C. 201
Shirt *v.* Calico Printers ... 57
Simmonds *v.* Stourbridge, &c. Clay Co. 61
Simmons *v.* Heath Laundry 55, 62
Singer *v.* Clark 101
Singleton *v.* Eastern Counties Rail. Co. 213
Sir John Bourne's Case..... 128
Six Carpenters' Case, The (Vaux *v.* Newman) 72
Skull *v.* Glenister..... 240
Slazenger *v.* Spalding 113
Smith *v.* Baker 31, 50
Smith *v.* Chadwick 195
Smith *v.* Clinton 248
Smith *v.* Giddy..... 92
Smith *v.* Jeffreys 132
Smith *v.* Johnson 202
Smith *v.* L. & S. W. Rail. Co. 26
Smith *v.* London and St. Katharine's Docks Co. 78, 80
Smith *v.* Marrable..... 191
Smith *v.* Milles..... 68
Smith *v.* Prosser 102
Smith *v.* Sievier 127
Smith *v.* South Eastern Rail. Co..... 26, 207, 211
Smithies *v.* N. A. O. P. ... 13
Smitton *v.* Orient S. N. Co. 205
Society of Accountants *v.* Goodway..... 115
Society of Architects *v.* Kendrick 115
Solomon *v.* Vintners' Co.... 88
Soltau *v.* De Held 92
Somerville *v.* Hawkins..... 160
S. African Republic *v.* La Cie. Franco-Belge 12

PAGE

S. Hetton Coal Co. *v.* N. E. News Assn. 140, 143, 144
S. Staffordshire Water Co. *v.* Sharman 99
S. Wales Miners' Federation *v.* Glamorgan Coal Co.... 117
Southcote *v.* Stanley..... 77
Southwark *v.* Wandsworth 24
Spain (King) *v.* Hulett ... 12
Speight *v.* Oliviera 120
Spencer *v.* Amerton 165
Spill *v.* Maule 166
Stace *v.* Griffith..... 161
Standard Bank of S. A. *v.* Standard Bank 114
Stanley *v.* Powell 204
Stanton *v.* Collier..... 10, 183
Steel *v.* Cammell Laird ... 56
Stevens *v.* Midland Counties Rail. Co.....81, 183
Stevens *v.* Sampson 168
Stevens *v.* Stevens..... 243
Stevens *v.* Woodward 38
Stevenson *v.* Glasgow Corporation 213
Stevenson *v.* Watson 19
Steward *v.* Gromett 184
Stockdale *v.* Hansard 152
Stone *v.* Hyde 51
Storey *v.* Ashton 38
Storey *v.* Challands 161
Stuart *v.* Bell.....150, 158, 159
Sutcliffe *v.* Booth 82
Sutton *v.* G. N. Rail. Co.... 53
Swainson *v.* N. E. Rail. Co. 40
Swan *v.* N. British, &c. Co. 203
Swire *v.* Francis 199

Tabart *v.* Tipper 129
Tapling *v.* Jones 98
Tarpley *v.* Blabey 127
Tarry *v.* Ashton..... 90
Taylor *v.* Best 12
Taylor *v.* G. Southern and Western Rail. Co..... 210

PAGE
Taylor *v.* M. S. & L. Rail. Co. 228
Temperton *v.* Russell...120, 121
Tenant *v.* Goodwin 216
Terry *v.* Hutchinson 118
Terry *v.* Sweeting 235
Thomas *v.* Bradbury..... 145, 147, 149
Thomas *v.* Quartermaine... 49
Thomas *v.* Winchester..... 222
Thompson, In re 110
Thompson *v.* City Glass Bottle Co. 48
Thompson *v.* Goold 65
Thompson *v.* Shackell 149
Thorley *v.* Lord Kerry 129
Thorne *v.* Heard 250
Thorogood *v.* Bryan 214
Tillett *v.* Ward 219
Tilling *v.* Dick, Kerr & Co. 22
Tinkley *v.* Tinkley 10
Toal *v.* N. B. Rail. Co. ... 208
Todd *v.* Flight 93
Todd *v.* Hawkins 165
Tomalin *v.* Pearson 55
Toronto Rail. Co. *v.* King... 206
Torrance *v.* Ilford U. D. C. 211
Tory *v.* Dorchester 21
Tozeland *v.* West Ham Guardians 209
Trinidad Asphalt Co. *v.* Ambard 87
Trotman *v.* Dunn 154
Truman *v.* L. B. & S. C. Ry. 26
Tucker *v.* Newman 68
Tuff *v.* Warman 211
Turner *v.* Goulden 19
Tutton *v.* Majestic S.S..... 64
Tynron *v.* Morgan..... 62

Udell *v.* Atherton..... 199
Ullmann *v.* Laura..... 113
Union Lighterage Co. *v.* London Graving Dock Co. 87
United Collieries *v.* Simpson 60, 234
PAGE
United States Playing Card Co., Re 113
Upper Forest, &c. Tinplate Co. *v.* Thomas 62
Usill *v.* Hales 167
Uttley *v.* Mitre Publishing Co. 8

Valentine *v.* Valentine..... 114
Vaughan *v.* Taff Vale Rail. Co. 25
Vaux *v.* Newman (Six Carpenters' Case)..... 72
Vicars *v.* Wilcocks 117
Villers *v.* Monsley 129, 138
Vizetelly *v.* Mudie's Select Library 139

Waite *v.* N. E. Rail. Co. ... 215
Waites *v.* Franco-British Exhibition 55
Wakelin *v.* L. & S. W. Rail. Co. 207, 211
Wakley *v.* Cooke 142
Waldron *v.* Junior A. & N. Stores 46
Walker *v.* Crystal Palace F. C. 55
Waller *v.* Loch 160
Walsh *v.* Southwark Borough Council 20
Walton *v.* Vanguard Motor Bus Co. 94, 207
Ward *v.* Hobbs..... 190
Ward *v.* Weeks 238
Warncken *v.* Moreland..... 64
Warren *v.* Warren 163, 166
Warwick *v.* New Motor Co. 114
Wason *v.* Walter 149, 169
Watkins *v.* Hall 139, 140
Watson *v.* Jones 153, 154
Webb *v.* Beavan 138
Webb *v.* Bird..... 95
Wedgerfield *v.* de Bernardy 124
Wellock *v.* Constantine ... 225

PAGE

Wells *v.* Abrahams 225
Wenman *v.* Ash 136, 137
Wennhak *v.* Morgan..... 136
West *v.* Bristol Tramways Co. 24, 27, 92
West Ham C. C. Board *v.* East London W. W. Co. 89
West Leigh Co. *v.* Tunnicliff 251
West Rand Mining Co. *v.* Regem..... 16
Western Bank of Scotland *v.* Addie 199
Western Counties, etc., Co. *v.* Lawes, etc., Co..... 175
Whatman *v.* Pearson 38
Whitbourne *v.* Williams ... 118
Whitbread *v.* Arnold 59
White *v.* France 80
White *v.* Jameson 93
White *v.* Leonard 8
White *v.* Mellin..... 175
White *v.* Spettigue 224
Whitehead *v.* Parks 85
Whiteley *v.* Adams 161
Whitfield *v.* S. E. Rail. Co. 136
Whitmores *v.* Edenbridge... 216
Whitmore *v.* Stanfords..... 83
Wilkinson *v.* Downton..... 202
Williams *v.* Birmingham Battery Co..... 45

PAGE

Williams *v.* Mersey Docks and Harbour Board ... 21, 22
Williams *v.* Morland 81
Williams *v.* Parsons.....80, 208
Williamson *v.* Freer 136
Willmett *v.* Harmer 143
Wilson *v.* Finch-Hatton ... 191
Wilson *v.* Merry 45
Wilson *v.* Tumman 32
Winchester (Bishop of) *v.* Knight 235
Wing *v.* L. G. O. Co. ...24, 93, 207, 221
Winkfield, The 99
Wisdom *v.* Brown 149
Wood *v.* Waud 81, 82
Woodgate *v.* Ridout 148
Woodhouse *v.* Walker 90
Woolf *v.* Woolf..... 7
Wright *v.* Lefever..... 78
Wright *v.* L. & N. W. Rail. Co. 46
Wright *v.* Woodgate..... 162

Yarborough *v.* Bank of England 11
Yarmouth *v.* France 49
Yates *v.* Jack..... 96
Yates *v.* S. Kirby Collieries 56
Yzquierdo *v.* Clydebank Engineering Co. ... 13, 241

INDEX TO STATUTES CITED.

PAGE

13 Edw. 1 (St. West. 2), c. 31 18
4 Edw. 3, c. 7 230
25 Edw. 3, c. 5 230
5 Ric. 2, c. 18, s. 1 (1381) 72
2 & 3 P. & M. c. 7 105
31 Eliz. c. 12 105
21 Jac. 1, c. 16 (Act for Limitation of Actions, 1623) 249
s. 3 71
29 Car. 2, c. 3 (Statute of Frauds), s. 4 193
31 Car. 2, c. 2, s. 9 18
1 Will. & M. st. 2, c. 2 (Bill of Rights) 151
4 & 5 Anne, c. 3 249
11 Geo. 2, c. 19, s. 19 73
24 Geo. 2, c. 44, s. 6 20
s. 8 250
14 Geo. 3, c. 78 (The Building Act), s. 86 221
5 Geo. 4, c. 83 (Vagrancy Act) 181
7 & 8 Geo. 4, c. 18 75
9 Geo. 4, c. 14 (Lord Tenterden's Act) 193
2 & 3 Will. 4, c. 71 (Prescription Act, 1832), s. 2 ..... 88, 95
s. 3 96
3 & 4 Will. 4, c. 27, s. 26 72
c. 42, s. 2 ..... 230, 235
5 & 6 Will. 4, c. 50 (General Highway Act), s. 70 75
c. 65 112
2 & 3 Vict. c. 47 (Metropolitan Police Act) 202
3 & 4 Vict. c. 9 152
5 & 6 Vict. c. 45 (Copyright Act, 1842), s. 3 111
6 & 7 Vict. c. 96 (Lord Campbell's Libel Act), s. 2 171
8 & 9 Vict. c. 18 (Lands Clauses Consolidation Act) .....

PAGE

8 & 9 Vict. c. 20 (Railway Clauses Consolidation Act) 25
c. 75, s. 2 172
9 & 10 Vict. c. 93 (Lord Campbell's Act).....22, 41, 51, 202, 212
s. 1 230
ss. 2, 4 231
17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854) ... 107
19 & 20 Vict. c. 97 249
20 & 21 Vict. c. 85 (Matrimonial Causes Act, 1857). ss. 25, 26 8
24 & 25 Vict. c. 95, s. 1 75
c. 100, s. 31 75
ss. 42—45 179
27 & 28 Vict. c. 95 231
32 & 33 Vict. c. 70 (Contagious Diseases (Animals) Act, 1869) 190, 246
33 & 34 Vict. c. 23, ss. 6, 8, 30 (Forfeiture Act, 1870) 5, 6
36 & 37 Vict. c. 66 (Judicature Act, 1873) ... .71, 107, 244
s. 25, sub-s. 3 89
s. 25, sub-s. 9 214
s. 29 18
37 & 38 Vict. c. 57 (Real Property Limitation Act, 1874), ss. 1, 9 71
38 & 39 Vict. c. 90 (Employers and Workmen Act, 1875) ... 47
43 & 44 Vict. c. 42 (Employers' Liability Act, 1880) ... 44, 46—52, 65, 233
45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882), s. 24 102
s. 81 103
c. 75 (Married Women's Property Act, 1882)...8, 249
ss. 1 (2), 12, 13, 14, 15 9
46 & 47 Vict. c. 52 (Bankruptcy Act, 1883), s. 44 10
50 & 51 Vict. c. 19 (Quarries Fencing Act, 1887), s. 3 76
51 & 52 Vict. c. 40 (County Courts Act, 1888), ss. 135, 136... 107
c. 64 (Law of Libel Amendment Act, 1888), s. 3 156
s. 4 ..... 158, 170, 171
52 & 53 Vict. c. 57 (Regulation of Railways Act, 1889), s. 5... 36
53 & 54 Vict. c. 64 (Directors' Liability Act, 1890) 188, 195
54 & 55 Vict. c. 51 (Slander of Women Act, 1891)..... 139
56 & 57 Vict. c. 32 (Barbed Wire Act, 1893), s. 3 (1) 76
c. 61 (Public Authorities Protection Act, 1893) 20—22, 250

PAGE

56 & 57 Vict. c. 71 (Sale of Goods Act, 1893), ss. 22, 23, 24, 26 ..... 103, 104, 105
57 & 58 Vict. c. 60 (Merchant Shipping Act, 1894), s. 418, sub-s. 4 214
60 & 61 Vict. c. 37 (Workmen's Compensation Act, 1897) ... 53, 54, 63
63 & 64 Vict. c. 22 (Workmen's Compensation Act, 1900) ...53, 54
5 Edw. 7, c. 11 (Railway Fires Act, 1905), s. 1 26
c. 15 (Trade Marks Act, 1905) ..... 112—114
6 Edw. 7, c. 32 (Dogs Act, 1906) 220
c. 47 (Trade Disputes Act, 1906)..... 70
ss. 1, 3, 5 ..... 120, 122, 123
s. 4 (1) 13
c. 58 (Workmen's Compensation Act, 1906)...44, 52—66, 234
s. 4 43
7 Edw. 7, c. 23 (Criminal Appeal Act, 1907) 104
c. 29 (Patent and Designs Act, 1907) ..... 108—111, 113
8 Edw. 7, c. 4 (Patents and Designs Act, 1908) 108
c. 7 (Fatal Accidents (Damages) Act, 1908) 233
c. 44 (Commons Act, 1908) 219
c. 67 (Children Act, 1908), s. 37..... 23
c. 69 (Companies (Consolidation) Act, 1908), s. 84... 188, 192, 195, 196
9 Edw. 7, c. 16 (Workmen's Compensation (Anglo-French) Convention Act, 1909) 55
c. 22 (Trade Boards Act, 1909) 120

LIST OF ABBREVIATIONS.

A. & E. .....Adolphus and Ellis.
Ad. & Ecc.....Admiralty and Ecclesiastical Cases (L.R.).
App. Cas. }
A. C. } .....Appeal Cases (L. R.)

B. & A. .....Barnewall and Alderson.
B. & Ad.....Barnewall and Adolphus.
B. & C. .....Barnewall and Cresswell.
B. & P. .....Bosanquet and Puller.
B. & S. .....Best and Smith.
Barn. .....Barnardiston.
Bing. .....Bingham.
Bing. N. C. .....Bingham, New Cases.
Bur.....Burrow.

C. A. .....Court of Appeal.
C. B. .....Common Bench Reports.
C. B. N. S.....Common Bench, New Series.
C. C. R. .....Court of Crown Cases Reserved (L. R.)
C. P. .....Common Pleas (L. R. and L. J.).
C. P. D. .....Common Pleas Division (L. R.).
C. & P. .....Carrington and Payne.
Camp. .....Campbell.
Ch. .....Chancery (L. R. and L. J.).
(1891), (1892), 1, 2, &c.,
Ch. .....(1891), (1892), Law Reports, 1, 2, &c., Chancery Division.
Ch. D. or Ch. Div. ...Chancery Division (L. R.).
Coke's Rep. .....Coke's Reports.
Cro. Eliz. .....Croke's Reports, temp. Elizabeth.

De G. M. & G. .....De Gex, Macnaghten and Gordon's Reports.
Dowl. N. S. .....Dowling, New Series.

E. & B. .....Ellis and Blackburn.
E. B. & E. .....Ellis, Blackburn and Ellis.
E. & E. .....Ellis and Ellis.

Eq. .....Equity (L. R.).
Esp.....Espinasse.
Ex. .....Exchequer Reports, Exchequer (L. R. and L. J.).
Ex. D. or Ex. Div. ...Exchequer Division (L. R.).
Ex. Ch., C. B. N. S....Exchequer Chamber, Common Bench Reports, New Series.
Ex. .....Exchequer Reports.

F. .....Fraser (Court of Session Cases, Scotland).
F. & F. .....Foster and Finlason.

H. & C. .....Hurlstone and Coltman.
H. & N. .....Hurlstone and Norman.
H. L. .....House of Lords (L. R.).
H. L. C. .....House of Lords Cases, by Clark and Finnelly —continued by Clark.
Hagg. .....Haggard.
Hob. .....Hobart's Reports.

I. R. C. L.....Irish Reports, Common Law.

J. P. .....Justice of the Peace.
Jur. N. S. .....Jurist, New Series.

K. B. .....King's Bench (L. R. and L. J.).

L. J. .....Law Journal.
L. J. N. S.....Law Journal, New Series.
L. R. .....Law Reports.
L. R. Ir.....Law Reports, Irish.
L. R. Ch. .....Law Reports, Chancery Appeals.
L. R. P. C. .....Law Reports, Privy Council.
L. R. Sc. App. .....Law Reports, Scotch Appeals.
L. R. Sc. & D. .....Law Reports, Scotch and Divorce Appeals.
Ld. Raym.....Ld. Raymond's Reports.
L. T. .....Law Times.
Lofft .....Lofft's Reports.

M. & G. .....Manning and Granger.
M. P. C. C. .....Moore's Privy Council Cases.
M. & S. .....Maule and Selwyn.
M. & W. .....Meeson and Welsby.
Mod. .....Modern Reports.
Moo. & M. .....Moody and Malkin.
Moo. & R. .....Moody and Robinson.

N. & M. .....Neville and Manning.
N. Y. .....New York.

(1891), (1892), &c., P....(1891), (1892), &c., Law Reports, Probate, Divorce, and Admiralty Division.
P. C. .....Privy Council (L. R. and L. J.).
P. W. .....Peere Williams.
Palm. .....Palmer.

Q. B. .....Queen's Bench Reports, Queen's Bench (L. R. and L. J.).
(1891), (1892), &c., 1, 2, Q. B. .....(1891), (1892), &c., 1, 2, Law Reports, Queen's Bench Division.
Q. B. D. .....Queen's Bench Division (L. R. and L. J.).

R. & M. .....Ryan and Moody.
R. R. .....Revised Reports.
Rep. .....Coke's Reports.

(1907), (1908), &c., S. C. .....(1907), (1908), &c., Court of Session Cases (Scotland).
Salk. .....Salkeld.
Sid. .....Siderfin.
Sim. N. S. .....Simons, New Series.
Sm. L. C. .....Smith's Leading Cases.
Stark. .....Starkie.
Str. .....Strange.
Swanst. .....Swanston.

T. R. .....Term Reports.
T. L. R. .....Times Law Reports.
Taunt. .....Taunton.

Ves. .....Vesey.

W. N. .....Weekly Notes.
W. R. .....Weekly Reporter.
W. Bl. .....William Blackstone.

Y. B. .....Year Books.
Yelv. .....Yelverton.

THE LAW OF TORTS.

CHAPTER I.

OF TORT IN GENERAL.

To define a tort is well known to be difficult and unsatisfactory. The best summary of the elements of which it is composed is that given by Sir Frederick Pollock (Law of Torts, 8th ed. pp. 19, 20), and to this the reader is referred. A good description for practical purposes is:—**A tort is an infringement of a general right or right in rem**—*i.e.*, a right available against the world at large.

On the one hand, a tort is to be distinguished from **crime**: on the other, from **breach of contract.**

(a) **It differs from crime** in respect of three considerations:—

(1) **As regards the consequences of the act or omission.**—A crime is regarded more as an injury to the whole community, considered in its social aggregate capacity; while a tort is regarded rather as an injury to a private individual, its consequences being deemed less deleterious to the community at large.

(2) **As regards the nature of the redress or remedy.**—In tort, the wrongdoer has to compensate the injured party, while in crime he is punished by the state.

(3) **As regards procedure.**—In tort, the action is brought by the injured party; in crime, proceedings are conducted in the name of the sovereign.

All the three elements of difference go to make up the distinction. Blackstone (*a*), and Professor Holland (*b*), rely only on the first; Austin (*c*), on the third.

(b) **It differs from breach of contract,** in that a tort is an infringement of a general right or a right in rem—*i.e.*, a right available against the world at large; whereas breach of contract is an infringement of a right *in personam*—*i.e.*, a right available against a definite person or persons. The same act, however, may be both a tort and a breach of contract, or a tort and a crime.

It is also to be distinguished from **breach of certain personal relations,** such, for example, as exist between a trustee and his *cestui que trust*, a husband and his wife, a shipowner and his salvors (*d*).

The newness of a tort is no objection to an action

(*a*) Stephen's Commentaries, 14th ed. vol. iv. p. 3.

(*b*) Holland's Jurisprudence, 10th ed. pp. 311, 312.

(*c*) Austin's Jurisprudence, 5th ed. vol. i. pp. 404, 405.

(*d*) For the general theory determining liability in tort, the student is referred to "The Common Law," by Mr. Justice O. W. Holmes, Lectures III. and IV.; more particularly pp. 161—163.

if it come within any principle upon which the courts act; but the court will grant no relief if it embraces some entirely new principle (*e*).

Where there is **injuria sine damno**, *i.e.*, the infringement of a legal right without any actual loss or damage, the person whose right is infringed has a cause of action. Thus in *Ashby* v. *White* (*f*), the defendant, a returning officer, wrongfully refused to register a duly tendered vote of the plaintiff, a legally qualified voter. The candidate for whom the vote was tendered was elected, and no loss was suffered by the rejection of the vote; nevertheless, it was held that an action lay (*g*).

Where there is **damnum sine injuria**, *i.e.*, actual and substantial loss without infringement of any legal right, no action lies: *e.g.*, A. and B. are rival schoolmasters; A. sets up a rival school next door to B.'s, and boys from B.'s school flock to A.'s. B. has no right of action against A., for no legal right has been infringed (*h*).

(*e*) Per Ashurst, J., in *Pasley* v. *Freeman* (1789), 3 T. R. 51; 1 R. R. 634; cf. per Lord Halsbury in *Janson* v. *Driefontein Mines* (1902) A. C. 484, at p. 491.

(*f*) (1703) Lord Raym. 938; cf. *Fulton* v. *Norton* (1908) A. C. 451.

(*g*) It is worth noticing, however, that Holt, C.J., expressly negatived the doctrine of *injuria sine damno*. See "The Judgments delivered by Chief Justice Holt, &c.," published by Messrs. Saunders & Benning, London, 1837.

(*h*) *Gloucester Grammar School case* (1410–11), in Year Book of 11 Henry 4, fol. 47, pl. 21; see also *Chasemore* v. *Richards* (1859),

Sometimes there is no *injuria* unless there is *damnum—i.e.*, in some cases actual damage is a necessary part of the cause of action, or in other words, is the gist of the action; for instance, this is so in actions of deceit (*i*), negligence (*k*), nuisance (*l*), and slander not actionable *per se* (*m*).

7 H. L. C. 349; *Dibden* v. *Skirrow* (1908) 1 Ch. 41; cf. *Gordon* v. *Chief Commissioner of Metropolitan Police* (1910), 74 J. P. 189; and *infra*, pp. 29, 30, and p. 84.

(*i*) *Infra*, p. 187.

(*k*) *Infra*, p. 201.

(*l*) *Infra*, p. 91.

(*m*) *Infra*, p. 138.

CHAPTER II.

OF VARIATIONS IN THE NORMAL RIGHT TO SUE ARISING FROM PERSONAL DISABILITY.

CERTAIN persons are not capable of suing or liable to be sued in tort owing to personal disability.

Categories of such persons.

(i.) An **alien enemy** cannot sue (*a*), but an alien friend is under no such disability (*b*). A company incorporated in another country is in the same position as an alien natural person (*c*).

(ii.) **A felon** at common law could not sue for torts to his property, because his property was forfeited to the Crown, but forfeiture for felony was abolished by the Forfeiture Act, 1870 (*d*). By that Act a **convict** as therein defined (*i.e.*, any person against whom judgment of death or penal servitude shall have been pronounced on any charge of treason or felony) (*e*) whose sentence is in force and unexpired,

(*a*) *De Wahl* v. *Braune* (1856), 1 H. & N. 178 ; *Netherlands S. African Ry.* v. *Fisher* (1901), 18 T. L. R. 116.

(*b*) Dyer, 2 b ; Com. Dig. Alien, C. 5.

(*c*) *Dutch West India Co.* v. *Henriques* (1725, 1729), Stra. 612, 808 ; and *Janson* v. *Driefontein Mines* (1902) A. C. 484.

(*d*) 33 & 34 Vict. c. 23.

(*e*) Sect. 6.

and who is not "lawfully at large under any licence, cannot sue "for the recovery of any property, debt, or damage whatsoever" (*f*). It would appear, however, that a felon who does not come within the operation of the Act, for instance one who has only been sentenced to imprisonment, may sue for wrongs to his property in his own name. At common law a felon might sue for personal injuries (*g*), and it would seem that he can still do so even if he comes within the operation of the Act (*h*).

(iii.) An infant may be sued for a tort, but not when it would have the effect of making him liable on a contract which he could not otherwise be liable upon; but the exception does not extend to protect an infant from the consequences of a wrong which has been induced by, and has arisen out of, a contract, but which is independent of the contract in the sense of not being an act of the kind contemplated by it. In *Jennings* v. *Rundall* (*i*), the defendant, who was an infant, hired a mare for riding, and injured it by over-riding. Held, defendant's infancy was a good defence, the action being founded

(*f*) Sects. 8, 30.

(*g*) Com. Dig. Forfeiture, B. 2; cf. *In re Gaskell and Walters* (1906), 22 T. L. R. 464.

(*h*) For the term "damage" in sect. 8 would probably be held to be restricted in its application to damage to property. See "The Law of Torts," by Clerk and Lindsell, 3rd ed. p. 42.

(*i*) (1799), 4 T. R. 335; 4 R. R. 680.

on contract. In *Burnard* v. *Haggis* (*k*), there was a similar contract, but defendant was expressly told that the mare must not be used for leaping. The mare was put at a fence, and in attempting to take it fell upon a stake, and was so injured that she died. Held, that the infant had committed an actionable wrong, and was therefore liable irrespective of the contract.

Further, **an infant is not allowed to take advantage of his own fraud,** and will be liable in equity to make restitution, where that is possible, for any advantage he has thereby gained (*l*).

An infant can, of course, sue for any tort done to him.

In actions of torts, as in other actions, an infant sues by his next friend and defends by his guardian *ad litem*.

(iv.) **Married women** *at common law* were not liable on contracts, and, consequently, the same rule applied to the contract of a married woman as to that of an infant—that it could not be indirectly enforced by framing the pleadings in tort (*m*). **In all real cases of tort,** however, a married woman is as liable as anybody else; but inasmuch as in the

(*k*) (1863), 14 C. B. N. S. 45.

(*l*) *Bartlett* v. *Wells* (1862), 31 L. J. Q. B. 57; *Lemprière* v. *Lange* (1879), 12 Ch. D. 675; cf. *Woolf* v. *Woolf* (1899) 1 Ch. 343 *Levene* v. *Brougham* (1909) 25 T. L. R. 265.

(*m*) *Earle* v. *Kingscote* (1900) 2 Ch. 585.

eye of the law she had no separate existence of her own apart from her husband, her husband had to be sued jointly with her (*n*).

There was, however, no cause of action against the husband personally; for he could only be rendered liable by being joined as a defendant, and this was necessary inasmuch as the wife could be neither a plaintiff alone nor a defendant alone.

If the husband died during the suit, the action went on against the wife; but if the wife died the action abated (*o*).

To charge the husband, therefore, it is necessary to sue him jointly with his wife in an action and to prosecute the same to judgment before his death or the pronouncement of a decree of divorce or of a decree of judicial separation (*p*). Separation by deed does not affect the husband's position at common law (*q*).

Under the **Married Women's Property Act, 1882** (45 & 46 Vict. c. 75), the wife is liable for her ante-nuptial torts, and may be sued for them, and sums

(*n*) *Liverpool Adelphi Loan Association* v. *Fairhurst and Wife* (1854), 9 Ex. 422.

(*o*) *Capel* v. *Powell* (1864), 17 C. B. N. S. 743; see per Erle, C.J., at p. 748.

(*p*) *Cuenod* v. *Leslie* (1909) 1 K. B. 880; *Capel* v. *Powell* (1864), 17 C. B. N. S. 743; *White* v. *Leonard* (1861), 30 L. J. C. P. 365, per Willes, J., at p. 367; and 20 & 21 Vict. c. 85, ss. 25 and 26.

(*q*) *Uttley* v. *Mitre Publishing Co.* (1901), 17 T. L. R. 720.

recovered against her are to be paid out of her separate property (*r*): the husband is also liable to the extent of the property he has obtained through his wife (*s*), and may be sued jointly with her or alone (*t*).

For torts committed by or against a wife **during marriage** she is sued or sues just as a *feme sole*, and sums recovered against her are to be paid out of her separate estate, and sums she recovers are part of her separate estate (*u*). The husband may or may not be joined with her in these actions, since the case of *Seroka* v. *Kattenburg* (*w*) has decided that the husband's position at common law with regard to his wife's torts committed during marriage is not interfered with by the Act. So where a husband is joined as a defendant with his wife, only one defence is available, and consequently a defence set up by the wife which is inconsistent with one already set up by the husband will be struck out (*x*).

As to torts committed **against the wife by her husband**, the wife may sue her husband for the protection and security of her own separate property;

(*r*) 45 & 46 Vict. c. 75, s. 13.
(*s*) *Ibid.*, sect. 14.
(*t*) *Ibid.* sect. 15.
(*u*) *Ibid.* sect. 1, sub-sect. 2.
(*w*) (1886), 17 Q. B. D. 177; approved in *Earle* v. *Kingscote* (1900) 2 Ch. 585 (C. A.); but see the criticisms of Moulton, L.J., in *Cuenod* v. *Leslie* (1909) 1 K. B. at pp. 888, 889.
(*x*) *Beaumont* v. *Kaye* (1904) 1 K. B. 292.

but further than that, no husband or wife is entitled to sue the other in tort (*y*). Thus, a wife cannot sue her husband for malicious prosecution (*z*).

(v.) **Bankrupts.** If a man is adjudicated bankrupt, his property becomes vested in a trustee for division among his creditors (*a*); but all his rights do not pass to the trustee in this way. Thus, if he has a right of action against a third person for a tort which only affects his person, reputation or feelings, such as false imprisonment, defamation, or trespass without damage, that right does not pass, and he can still sue as if the bankruptcy had never occurred (*b*). If, on the other hand, the tort injures his estate, as in the case of deceit or slander of title, then the right of action passes to the trustee, and the bankrupt cannot sue (*c*). In certain cases, however, the tort may affect the bankrupt personally as well as his property, and then either the cause of action is divided between him and the trustee or they must join together in bringing the action (*d*).

(*y*) 45 & 46 Vict. c. 75, s. 12; cf. *Reg.* v. *Lord Mayor of London* (1886), 55 L. J. M. C. 118.

(*z*) *Tinkley* v. *Tinkley* (1909), 25 T. L. R. 264.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.

(*b*) *Rose* v. *Buckett* (1901) 2 K. B. 449; *Stanton* v. *Collier* (1854), 23 L. J. Q. B. 116.

(*c*) *Hodgson* v. *Sidney* (1866), L. R. 1 Ex. 313; *Morgan* v. *Steble* (1872), L. R. 7 Q. B. 611.

(*d*) See *Beckham* v. *Drake* (1850), 2 H. L. Cas. at p. 632.

(vi.) **Corporations.** For a long while difficulties, due rather to considerations of procedure than to any fancied obstacle arising from a corporation's artificial personality, were felt in admitting that a corporation could be sued. In 1812 it was held, in *Yarborough* v. *Bank of England* (*e*), that **trover** lay against a corporation; and in 1842, in *Maund* v. *Monmouthshire Canal Co.* (*f*), that **trespass** also lay. It was formerly doubted whether a corporation, being incapable in its corporate character of a malicious intention, could be liable to an action for **malicious prosecution** (*g*); but it was finally decided that such an action would lie (*h*). It is now clear law that a corporation is liable for torts committed by its servants and agents, provided (1) the thing done is within the powers and for the purposes of the corporation, and (2) done so that it would be actionable if done by an individual (*i*).

(vii.) **Lunatics.** It is still uncertain to what extent a lunatic or person of unsound mind is liable in tort.

(*e*) 16 East, 6; 14 R. R. 272.

(*f*) 4 M. & G. 452.

(*g*) *Stevens* v. *Midland Counties Ry. Co.* (1854), 10 Ex. 352.

(*h*) *Edwards* v. *Midland Ry. Co.* (1880), 6 Q. B. D. 287; *Kent* v. *Courage* (1891), 55 J. P. 264; *Rayson* v. *South London Tramways Co.* (1893) 2 Q. B. 304; *Cornford* v. *Carlton Bank* (1899) 1 Q. B. 392; affirmed on another point (1900) 1 Q. B. 22 (C. A.); *Citizens' Life Assurance Co.* v. *Brown* (1904) A. C. 423. See also Clerk and Lindsell on Torts, 3rd ed. p. 58, note (*b*).

(*i*) See pp. 32—66, *infra*, and the cases there cited.

It is obvious that there are a number of torts he cannot commit (*k*).

A lunatic so found sues or defends by his committee; if not so found, he sues by his next friend and defends by his guardian *ad litem*.

(viii.) **Foreign sovereigns** and **ambassadors** resident in this country can sue in an English court (*l*), but cannot be sued, unless indeed they waive their privilege by voluntary submission to the jurisdiction or otherwise (*m*).

If, however, they do sue, they submit to all proceedings available to the defendant in respect of the claim (*n*), but the defendant cannot raise a counterclaim which has nothing to do with the original claim (*o*).

There is no rule that the monarch or other titular head of a foreign sovereign state is alone capable

(*k*) See Pollock's Torts, 8th ed. pp. 54, 55; cf. *Rex* v. *Meade* (1909) 1 K. B. 895.

(*l*) *King of Spain* v. *Hullett* (1828), 1 Dow. & Cl. 169; *Republic of Peru* v. *Weguelin* (1872), L. R. 7 C. P. 352; (1875), 20 Eq. 140; *Magdalena Steam Navigation Co.* v. *Martin* (1859), 28 L. J. Q. B. 310.

(*m*) *Duke of Brunswick* v. *King of Hanover* (1848), 2 H. L. C. 1; *Taylor* v. *Best* (1854), 23 L. J. C. P. 89, 93; *The Parlement Belge* (1880), 5 P. D. 197, 214; *Mighell* v. *Sultan of Johore* (1894) 1 Q. B. 149; *The Jassy* (1906) P. 270.

(*n*) *Republic of Costa Rica* v. *Erlanger* (1876), 3 Ch. D. 62.

(*o*) *South African Republic* v. *La Cie. Franco-Belge* (1898) 1 Ch. 190; cf. *Imperial Japanese Government* v. *P. & O. Co.* (1895) A. C. 644.

of suing here in respect of the public property or interest of that state (*p*).

(ix.) The Trade Disputes Act, 1906 (*q*), has added an entirely new exception.

No court shall entertain an action against a **Trade Union**, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union (*r*).

It has been held, however, that this section does not protect the persons who actually commit the tort on behalf of the trade union, unless a trade dispute (*s*) is in existence or contemplation (*t*). The Act is not retrospective (*u*).

(*p*) *Yzquierdo* v. *Clydebank Engineering Co.* (1902) A. C. 524.
(*q*) 6 Edw. 7, c. 47, s. 4 (1).
(*r*) *Bussy* v. *Amalgamated Society of Railway Servants* (1908), 24 T. L. R. 437.
(*s*) See pp. 122, 123, *infra*.
(*t*) *Richards* v. *Bartrum* (1908), 25 T. L. R. 181.
(*u*) *Smithies* v. *National Association of Operative Plasterers* (1909) 1 K. B. 310.

CHAPTER III.

OF VARIATIONS IN THE NORMAL RIGHT TO SUE ARISING FROM THE EXISTENCE OF SPECIAL CIRCUMSTANCES.

CERTAIN acts would fall within the sphere of tort, rendering the doer liable to an action for damages, were it not for their being of an altogether exceptional nature (*a*).

Categories of such exceptions (*b*).

[**Definition.**—Actor: a person who does an act which but for special matter of excuse or justification would be actionable.]

I. Privilege of actor.

1. Public.
   - *a.* Acts of state.
   - *b.* Judicial acts, *i.e.*, acts of judicial officers in the course of their duty.
   - *c.* Executive acts, *i.e.*, acts of executive officers in the course of their duty.

(*a*) It is due to Sir Frederick Pollock to state here that I am much indebted to him in respect of this chapter. For a full and exhaustive discussion of its subject-matter the reader is referred to Book I. Chap. IV. of that learned author's treatise on the Law of Torts.

(*b*) The threefold division given in the text does not profess to be anything more than a rough classification.

2. Private.
   a. Quasi-judicial acts, *e.g.*, of committee of club.
   b. Disciplinary powers of private persons.
   c. Powers conferred by law.

II. Equal rights.
1. Inevitable accident.
2. Exercise of common rights, *e.g.*, trade competition.

III. Sufferer disentitled.
1. Leave and licence.
2. Self-defence.
3. Acts of necessity.

I. Privilege of actor.

1. Public.

a. **An act of state** is either—

(i.) An act done by a foreign prince or ruler or his representative, *e.g.*, the ambassador of some other sovereign state, in his political capacity (*c*) ; or

(ii.) An act done by a representative of the Crown (previously sanctioned or subsequently ratified by the Crown),

(*c*) *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1859), 13 M. P. C. C. 22 ; *Carr* v. *Fracis Times & Co.* (1902) A. C. 176.

affecting the person or property of some one not a British subject.

In *Buron* v. *Denman* (*d*), plaintiff sued defendant, a naval captain, for burning plaintiff's barracoons and releasing slaves in them. It was held that defendant was not liable, having acted in the capacity of an officer of the Crown, and the Crown having accepted his act as its own.

The rule laid down in this case applies only to an action by a foreigner. But it probably also applies where the act complained of is an act of state, *e.g.*, annexation, which itself makes the intending plaintiff a subject (*e*).

As between a sovereign and his subjects, there is no such thing as an act of state; *i.e.*, to plead the sovereign's command is no excuse, unless such command is lawful in itself, "for the warrant of no man, not even of the king himself, can excuse the doing of an illegal act" (*f*). It is for the court

(*d*) (1859), 2 Ex. 167.

(*e*) *Cook* v. *Sprigg* (1899) A. C. 552; *Salaman* v. *Secretary for India* (1906) 1 K. B. 613; cf. *West Rand Mining Co.* v. *Regem* (1905) 2 K. B. 391.

(*f*) Per cur. in *Sands* v. *Child and others* (1693), 3 Lev. 352.

to determine whether the command is or is not lawful (*g*).

In accordance with the principle laid down above, "if any person commits a wrongful act, he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive Government, or of any officer of state" (*h*). Under the ordinary law of agency, however, "the head of a Government department is not liable for the neglect or torts of officials in the department, unless it can be shown that the act complained of was substantially the act of the head himself, in which case he would be liable as an individual, just as a stranger committing the same act would be" (*h*).

The Governor of a Colony does not possess sovereign power. His authority is derived from his commission and is limited to the powers expressly or

(*g*) As to the position of the agents of the Government when martial law is proclaimed see *Marais* v. *General Officer Commanding* (1902) A. C. 109; *Ex parte Mgomini* (1906), 94 L. T. 558.

(*h*) Per Romer, L.J., in *Raleigh* v. *Goschen* (1898) 1 Ch. at p. 77; cf. *Rex* v. *Earl of Crewe* (1910), 26 T. L. R. 439 (C. A.).

impliedly granted to him. Consequently he may be sued in the Courts of England or of his Colony (*i*).

b. **Judicial acts.**—Judges of superior courts,—*i.e.*, the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the High Court of Justice and any Divisional Court thereof (*k*), Courts of Nisi Prius and Assize (*l*),—are not liable for acts done in their judicial capacity, or for errors of judgment, but—

(i.) By 31 Car. 2, c. 2, s. 9, a judge in vacation who refuses to grant a writ of *habeas corpus* is liable;

(ii.) By 13 Edw. 1 (St. West. 2), c. 31, a judge who refuses to seal a bill of exceptions is liable (*m*).

The same immunity applies to judges of inferior courts (*n*), but in a superior court it is presumed that everything is within its jurisdiction, and the plaintiff

(*i*) *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161; *Cameron* v. *Kyte* (1835), 3 Knapp, P. C. C. 332; *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1; and *Musgrave* v. *Pulido* (1880), 5 App. Ca. 102.

(*k*) Judicature Act, 1873, s. 29.

(*l*) *Ex parte Fernandez* (1861), 30 L. J. C. P. 321.

(*m*) This practice is now obsolete.

(*n*) *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 220.

must prove the contrary. In inferior courts, there is no such presumption, and the judge must prove that the act complained of is within his jurisdiction (*o*).

Members of naval and military courts-martial are not liable for acts done in their capacity as such (*p*); nor is a member of an ecclesiastical court (*q*).

An arbitrator, or quasi arbitrator, as being *in loco judicis*, if acting honestly is not liable for negligence or errors in judgment (*r*); but he is, of course, liable for fraud or collusion (*s*). A mere valuer, on the other hand, not being *in loco judicis*, is liable for negligence (*t*).

c. **Executive acts.**—No action lies against a public officer for the regular enforcement of any sentence or process of law within the jurisdiction of the court

(*o*) *Houlden* v. *Smith* (1850), 14 Q. B. 841; cf. *Allbutt* v. *Gen. Med. Council* (1889), 23 Q. B. D. 400; *Quinn* v. *Pratt* (1908) 2 Ir. R. 69.

(*p*) *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744; *Dawkins* v. *Prince Edward of Saxe-Weimar* (1876), 1 Q. B. D. 499.

(*q*) *Barratt* v. *Kearns* (1905) 1 K. B. 504.

(*r*) *Stevenson* v. *Watson* (1879), 4 C. P. D. 148 (architect nominated to certify what was due to contractor). See also *Chambers* v. *Goldthorpe* (1901) 1 K. B. 624.

(*s*) *Ibid.* See also *Pappa* v. *Rose* (1872), L. R. 7 C. P. 525.

(*t*) *Turner* v. *Goulden* (1873), L. R. 9 C. P. 57.

under whose authority he acts, but he must act "in a manner in itself reasonable, and in execution of an apparently regular warrant or order, which, on the face of it, he is bound to obey" (*u*). Where, however, the court issuing process has no jurisdiction, officers are liable at common law (*x*); but a constable or officer acting under a justice's warrant is protected by 24 Geo. 2, c. 44, s. 6, if he produce a copy of such warrant within six days of demand.

By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), every action brought against any person for any act (*y*) in pursuance or execution or intended execution of any statutory or public duty or authority (*z*), *must be*

(*u*) Pollock, 8th ed. p. 119. See also *Mayor of London* v. *Cox* (1867), 2 H. L. at p. 269.

(*x*) *Clark* v. *Woods* (1848), 2 Ex. 395.

(*y*) As to what acts are within the statute, see *Greenwell* v. *Howell* (1900) 1 Q. B. 535; *Offin* v. *Rochford R. D. C.* (1906) 1 Ch. 342; *Lyles* v. *Southend Corporation* (1905) 2 K. B. 1; *Salisbury* v. *Gould* (1904), 68 J. P. 158; *Rex* v. *Carter* (1904), 68 J. P. 466; and *Walsh* v. *Southwark Borough Council* (1908), 72 J. P. 71. As to the time from which the statute begins to run, see *Polley* v. *Fordham* (1904) 2 K. B. 345; *Hague* v. *Doncaster R. D. C.* (1909), 100 L. T. 121; *Harrington* v. *Derby* (1905) 1 Ch. 205.

(*z*) This may include what is called "municipal trading" under statutory powers. See *Blake* v. *London C. C.* (1904) 2 K. B. 501.

brought (*a*) within six months from the date of the act complained of, and the defendant is entitled, in lieu of or in addition to any other plea, to plead tender of amends before the action was commenced. The Act also provides (*b*) that if the plaintiff has not, in the opinion of the Court, afforded the defendant sufficient opportunity of tendering amends before the commencement of the action, the Court may award costs to the defendant. When costs are awarded to a public authority, they are to be taxed "as between solicitor and client" (*c*).

The Act is not confined to "local authorities," and consequently applies to such bodies as the Tyne Improvement Commissioners (*d*) and the Mersey Docks and Harbour Board (*e*). It does not, however, apply to an independent

(*a*) Mere negotiation is not enough: *Hewlett* v. *London C. C.* (1908), 72 J. P. 136.

(*b*) Sect. 1, sub-sect. (*d*).

(*c*) The Court's discretion in awarding costs is not taken away: *Bostock* v. *Ramsey U. D. C.* (1900) 2 Q. B. 616. As to costs in the County Court, see *Tory* v. *Dorchester* (1907) 1 K. B. 393.

(*d*) *The Johannesburg* (1907) P. 65.

(*e*) *Williams* v. *Mersey Docks and Harbour Board* (1905) 1 K. B. 804.

contractor doing the work the authority is authorized to do (*f*).

An action under Lord Campbell's Act is within the statute (*g*) but not an action against a public authority for fraudulent misrepresentation (*h*). Appeals are not within the Act (*i*).

2. **Private.**

a. **Quasi-judicial acts,** *e.g.*, acts of universities, colleges, club committees, Inns of Court.

Persons exercising quasi-judicial powers are not liable for removing a man from office or membership, or otherwise dealing with him to his disadvantage, provided they "follow the requirements of natural justice" (*k*), that is—

(1) act in good faith;

(2) give him a fair and sufficient notice of his offence;

(*f*) *Tilling* v. *Dick Kerr & Co.* (1905) 1 K. B. 562; *Kent County Council* v. *Folkestone* (1905) 1 K. B. 620.

(*g*) *Williams* v. *Mersey, &c., Board*, note (*e*), *supra*; *Gawley* v. *Belfast Corporation* (1908) 2 Ir. R. 34.

(*h*) *Pearson* v. *Dublin* (1907) A. C. 351; cf. *The Burns* (1907) P. 137; *Holsworthy U. D. C.* v. *Holsworthy R. D. C.* (1907) 2 Ch. 62.

(*i*) *Fielden* v. *Morley* (1900) A. C. 133; *Montgomery* v. *Haddington* (1908) A. C. at p. 175.

(*k*) *Hope* v. *L'Anson* (1901), 18 T. L. R. 201, at p. 206.

(3) give him an opportunity of defending himself (*l*);

(4) observe the rules (if any) laid down by statute or by the particular body to which they belong.

If these conditions are satisfied the Court will not interfere, even if it thinks the decision is wrong (*m*).

If the statute give absolute discretionary powers there is no necessity to show proceedings in the nature of judicial proceedings, or, indeed, any reason at all for the act complained of (*n*).

b. **Disciplinary powers of private persons.**

Parents and persons *in loco parentis* are not liable for exercising summary force and restraint, if acting *bonâ fide* and in a reasonable and moderate manner (*o*).

(*l*) *Gray* v. *Allison* (1909), 25 T. L. R. 531 ; cf. *Ex parte Chang* (1909) A. C. 312 ; but see *Green* v. *Howell* (1910) 1 Ch. 495 (C. A.) A notice sent by post is enough : *James* v. *Institute of Chartered Accountants* (1907), 98 L. T. 225 (C. A.).

(*m*) *Dawkins* v. *Antrobus* (plaintiff expelled from club) (1881), 17 Ch. D. 615 ; *Labouchere* v. *Wharncliffe* (1880), 13 Ch. D. 346.

(*n*) *Hayman* v. *Governors of Rugby School* (1874), L. R. 18 Eq. 28 ; *Abergavenny* v. *Llandaff* (*Bp. of*) (1888), 20 Q. B. D. 460.

(*o*) Blackstone, i. 453 ; *In re Agar-Ellis* (1883), 24 Ch. D. 321 ; *Cleary* v. *Booth* (1893) 1 Q. B. 465 ; and see modern examples collected in Clerk and Lindsell on Torts, 5th ed., pp. 223, 224 ; the latest case is *Mansell* v. *Griffin* (1908) 1 K. B. 947 (C. A.). This right is expressly saved in the Children Act, 1908, s. 37.

The master of a merchant ship has by necessity the right of using force to preserve order and discipline (*p*); but where the case admits of delay, proper inquiry should precede the act.

c. **Powers conferred by law.**

Where damage incidentally arises from an act authorized by statute, no action lies if such act be done with judgment and caution (*q*), and the injured party can only recover such compensation as the statute gives him (*r*). In *Rex* v. *Pease* (*s*), it was held that where the legislature has authorized a railway company to lay down a railway alongside a public highway, it must be presumed to have contemplated the possibility that the railway would be a nuisance to persons using the highway, and that such persons

(*p*) Per Lord Stowell, in *The Agincourt* (1824), 1 Hagg. 271, 274; 33 R. R. 717.

(*q*) Per Lord Truro, in *L. & N. W. Ry. Co.* v. *Bradley* (1851), 3 Mac. & G. at p. 341, and per cur. in *East Fremantle Corporation* v. *Annois* (1902) A. C. at p. 217; and see *West* v. *Bristol Tramways Co.* (1908) 2 K. B. 14.

(*r*) Per Lord Blackburn, in *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. at p. 455; *Southwark* v. *Wandsworth* (1898) 2 Ch. 603; but see *Piggott* v. *Middlesex C. C.* (1909) 1 Ch. 134.

(*s*) (1832), 4 B. & Ad. 42; *Gunter* v. *James* (1908) 72 J. P. 448; but see *Wing* v. *London General Omnibus Co.* (1909) 2 K. B. 652.

must submit to the inconvenience necessarily resulting from the working of the railway. This case was confirmed and extended in *Hammersmith Railway Co.* v. *Brand* (*t*), where it was held that the Lands Clauses Consolidation Act and Railway Clauses Consolidation Act do not contain provisions under which a person whose land is not taken by the railway company can obtain statutory compensation for damage occasioned, without negligence, by the vibration of passing trains.

In *L. B. & S. C. Railway Co.* v. *Truman* (*u*), the appellant company was held not liable to occupiers of houses near the company's station for noises and annoyance caused by cattle and drovers on the company's land.

In *Vaughan* v. *Taff Vale Railway Co.* (*x*), the defendant company was held not liable for damage caused by sparks from their engines setting fire to the dry plantation of the plaintiff, as they were authorized to

(*t*) (1869), L. R. 4 H. L. 171.

(*u*) (1885), 11 App. Cas. 45.

(*x*) (1860), 6 H. & N. 679 (Ex. Ch.). See also *Sadler* v. *South Staffordshire, &c., Co.* (1889), 23 Q. B. D. 17; *Harrison* v. *Southwark and Vauxhall Water Co.* (1891) 2 Ch. 409; *Port Glasgow Sailcloth Co.* v. *Caledonian Ry. Co.* (1893), Sess. Cas. scr. iv. vol. 20, p. 35 *C. P. R. Co.* v. *Roy* (1902) A. C. 220.

use such engines, and had adopted every precaution which science could suggest to prevent injury. This application of the principle to railway fires has been altered by the Railway Fires Act, 1905 (*y*), which takes away this defence, in actions for damage to agricultural lands or crops caused by sparks from engines, where the claim for damage does not exceed 100*l*.

In *Smith* v. *L. & S. W. Railway Co.* (*z*) defendant company's workmen in a hot summer left some grass lying for a fortnight close to the line. The sparks from an engine set fire to this dry grass, and the fire, thus begun, spread, and ultimately burnt down plaintiff's cottage. Held, defendants were liable, having been guilty of negligence.

Whether an act amounting to a nuisance is justified or not by statute is a question of construction in each case (*a*).

In *Truman* v. *L. B. & S. C. Railway Co.* (*b*), Bowen, L.J., mentioned the three types of authorization a statute may give: (1) the statute may

(*y*) 5 Edw. 7, c. 11, s. 1.

(*z*) (1870), L. R. 6 C. P. 14.

(*a*) *Canadian Pacific Ry. Co.* v. *Peake* (1899) A. C. 535.

(*b*) (1885), 29 Ch. D. at p. 108; see also the observations of Cozens-Hardy, M.R., in *Price* v. *London C. C.* (1908) 2 Ch. at pp. 543, 544.

authorize a nuisance; (2) it may authorize certain works, provided they can be done without causing a nuisance; or (3) it may authorize works to be carried out, if possible, without a nuisance, but may authorize the nuisance itself, if necessary, in the last resort.

Cases where the statute (1) "**directs that a thing shall at all events be done,**" as in *Hammersmith Railway Co.* v. *Brand* (*c*), must be distinguished from those in which (2) **only a discretionary power, with choice of time and place, is given.** In the latter case due regard to the common rights of others must be taken.

In *Metropolitan Asylum District Board* v. *Hill* (*d*), it was held that a district board could not set up a statute authorizing a small-pox hospital as an answer to an action, or to prevent an injunction issuing to restrain the board from establishing a hospital where the establishment of such hospital would be a nuisance. They must find a different site where they would not be creating a nuisance.

(3) An example of the third case is *Truman* v. *L. B. & S. C. Railway Co.* (*e*).

(*c*) *Supra*, p. 25.

(*d*) (1881), 6 App. Cas. 193. See also *Rapley* v. *London Tramways Co.* (1893) 2 Ch. 588; *West* v. *Bristol T. Co.* (1908) 2 K. B. 14 (C. A.); and *Liverpool, &c. S.S. Co.* v. *Mersey Trading Co.* (1909) 1 Ch. 209 (C. A.).

(*e*) *Supra*, p. 25; and see *Hartley* v. *Rochdale Corporation* (1908) 2 K. B. 594.

II. Equal rights.

1. Inevitable accident.

It has been a matter of much discussion whether an inevitable accident—*i.e.*, an accident not avoidable by any such precaution as a reasonable man could be expected to take—is a good defence to an action for damages. The matter is very fully discussed by Sir Frederick Pollock (see his book, 8th ed. pp. 135—148), and that learned author comes to the conclusion that in English, as in American, law, inevitable accident is a good excuse. "But although inevitable accident, or, as it is sometimes called, the act of God, is an answer when the different rights are co-ordinated by the common law, yet some of those rights which co-exist at common law may, by the express language of some statute, be subordinated to others. In such a case, the words of the statute must receive their natural construction; and, if it appears clear that a liability is imposed, even for the result of inevitable accident, the Courts cannot introduce any exception thereto by intendment of law" (*f*). This is always a matter of construction, and, where the exception would work injustice, the

(*f*) Addison on Torts, 8th ed. p. 20.

intention of the statute must very clearly appear (*g*).

2. **Exercise of common rights.**

If a man be injured by the lawful exercise of another's ordinary rights, he has no action; and it is immaterial whether the exercise of such rights is prompted by a malicious motive (*h*). In the words of Lord Herschell in the House of Lords in the important case of *Allen* v. *Flood* (*i*), "An act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action." Thus, though a man be utterly ruined by his enemy establishing a rival shop across the road, which is carried on at a loss solely to pay off an old grudge, yet he is totally without remedy (*k*). But the defendant must keep well within his rights. Thus, in the case cited, "if a man

(*g*) See *River Wear Commissioners* v. *Adamson* (1877), L. R. 2 App. Cas. 743.

(*h*) Per Lords Watson and Macnaghten, in *Mayor of Bradford* v. *Pickles* (1895) A. C. at pp. 598, 601. See also *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1892) A. C. p. 25; *Davis* v. *Bromley Corporation* (1908) 1 K. B. 170.

(*i*) (1898) A. C. at p. 135. See also the judgment of Lord Macnaghten in *Quinn* v. *Leathem* (1901) A. C. at pp. 508, 509.

(*k*) See *The Gloucester Grammar School case* (1410, 1411), Y. B. 11 Hen. 4, fol. 47, pl. 21.

should lie in wait and fright the boys from going to school, that schoolmaster might have an action for the loss of his scholars" (*l*). Trade competition, even though it is carried to an extreme length and causes damage to the plaintiff, is not actionable, provided that the defendant has acted solely with the lawful object of obtaining success in trade, and has used no unlawful means (*m*).

III. **Sufferer disentitled.**

1. **Leave and licence. Volenti non fit injuria.** **No action is maintainable for damage arising from acts suffered by consent, if such acts were not likely nor intended to cause bodily harm.** Thus, boxing with padded gloves is lawful, but not fighting with the naked fist; football, because no hurt worth speaking of is likely, but not a kicking match (*n*). But a man may consent to the infliction of bodily harm on himself for some just cause, as, *e.g.*, to a surgical operation. It must always be remembered

(*l*) Per Holt, C.J., in *Keeble* v. *Hickeringill* (1809), 11 East, 576, n.; 11 R. R. 273, n. See also the cases of *Chasemore* v. *Richards* (*infra*, p. 84) and *Acton* v. *Blundell* (1843), 12 M. & W. 324.

(*m*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q. B. D. at pp. 613, 614; (1892) A. C. at pp. 40–44, 59.

(*n*) *Reg.* v. *Coney* (1882), 8 Q. B. D., per Cave, J., at p. 539, and per Stephen, J., at p. 549.

that mere knowledge is not enough. There must be consent. The maxim is "*volenti* non fit injuria," not "scienti non fit injuria" (*o*).

2. **Self-defence.** Defence of one's own person (*p*), property (*q*), or possession (*r*) is an excuse; but the force employed must not be out of proportion to the apparent urgency of the occasion. It must not exceed what an average reasonable man in a similar position would believe to be necessary; *e.g.*, it is not justifiable to use a deadly weapon to defend oneself from a blow with the hand (*s*).

3. **Acts done of necessity to avoid a greater harm;** *e.g.*, pulling down houses to stop a fire is no doubt excusable (*t*).

(*o*) *Smith* v. *Baker* (1891) A. C. 325.
(*p*) *Dale* v. *Wood* (1822), 7 Moore, C. P. 33.
(*q*) *Scott* v. *Shepherd* (1773), 2 W. Bl. 892; and see *infra*.
(*r*) *Roberts* v. *Taylor* (1845), 1 C. B. 126, 127.
(*s*) *Reece* v. *Taylor* (1835), 4 N. & M. 469.
(*t*) *Maleverer* v. *Spink* (1538), Dyer, 35 *b*, 36 *b*; but see *Carter* v. *Thomas* (1893) 1 Q. B. 673, discussed in *Cope* v. *Sharpe* (1910) 1 K. B. 168.

CHAPTER IV.

OF LIABILITY FOR THE WRONGS OF OTHERS.

The wrongdoer himself is always personally liable, both where he himself has done the act and where he has distinctly authorized it (*a*). As regards ratification, however, only such acts bind a principal by subsequent ratification as were professedly done at the time on the principal's behalf (*b*). "What is done by the immediate actor on his own account cannot be effectually adopted by another, neither can an act done in the name and on behalf of Peter be ratified either for gain or for loss by John" (*c*). But what if the party charged says he is acting as the agent or servant of another? In *Cullen* v. *Thomson's Trustees* (*d*) the managers of a joint-stock company were held personally liable for fraudulent statements, and were not allowed to excuse themselves on the ground that they had acted

(*a*) See *National Phonograph Co.* v. *Edison Bell, &c., Co.* (1908) 1 Ch. 335 (C. A.).

(*b*) *Wilson* v. *Tumman* (1843), 6 M. & G. 236; *Keighley* v. *Durant* (1901) A. C. 240.

(*c*) Pollock, 8th ed. pp. 76, 77.

(*d*) (1862), 4 Macqueen's Scotch App. 424.

as the servants or agents of the directors in making such statements; and Lord Westbury, L.C., said "all persons directly concerned in the commission of a fraud are to be treated as principals, and must not be permitted to excuse themselves on the ground that they acted as the agents or servants of others; for the contract of agency or service cannot impose any obligation on the agent or servant to commit, or assist in the committing of, fraud." And this is equally true of all wrongs besides fraud. But where a person is not the servant or agent of the person sued for a tort committed by the former, the latter is not liable (*e*).

An agent may be liable for his principal's torts although acting quite *bonâ fide* if he impliedly contracts with the third party to indemnify him. Thus, where a stockbroker *bonâ fide* prepared a transfer under circumstances which were held to bind him to a warranty that the person transferring was the person registered as holder, he was held liable for any loss arising from the transfer being forged (*f*).

Liability of a master for the wrongful acts or omissions of his servants.—A master is responsible for the wrongful acts or omissions of his servant

(*e*) *Hillyer* v. *St. Bartholomew's Hospital* (1909) 2 K. B. 820 (C. A.).

(*f*) *Sheffield Corporation* v. *Barclay* (1905) A. C. 392; *Bank of England* v. *Cutler* (1908) 2 K. B. 208 (C. A.); but see *Hindle* v. *Brown* (1908), 98 L. T. 791.

committed in the course of his employment, whether the wrong be committed negligently, wantonly, or even wilfully, and though no express command or privity of the master be proved (*g*).

This is the general rule: we have thus two points to consider: **I. What is "the course of the employment"?** and **II. Who is to be deemed a servant?** Of these in their order:—

I. What is "the course of the employment"?

In *Limpus* v. *London General Omnibus Co.* (*h*), the driver of defendants' omnibus drove it across the road in front of plaintiff's rival omnibus, which was thereby overturned. Defendants had expressly forbidden their drivers to obstruct any omnibus. Held, that defendants were liable, the question being (per Willes, J.), "Did the servant do it to serve his master's interests, or did he act merely from private spite, and with the intention of injuring his enemy?" The master is liable in the former, but not in the latter case (*i*).

(*g*) *E. London Harbour Bd.* v. *Caledonia Landing, &c., Co.* (1908) A. C. 271; *Refuge Ass. Co.* v. *Kettlewell* (1908) 1 K. B. 645; (1909) A. C. 243; *Lambert* v. *G. E. R.* (1909) 2 K. B. 776; cf. *Baker* v. *Snell* (1908) 2 K. B. 825; *Malcolm* v. *Waterhouse* (1908), 24 T. L. R. 854.

(*h*) (1862), 32 L. J. Ex. 34.

(*i*) See also *Seymour* v. *Greenwood* (1861), 7 H. & N. 355; 30 L. J. Ex. 327; *British Mutual Banking Co.* v. *Charnwood, &c., Co.* (1877) 18 Q. B. D. 714; *Marsh* v. *Joseph* (1897) 1 Ch. 213; *Baker* v. *Snell* (1908) 2 K. B. 825; *Comerford* v. *Britannic Ass.*

In *Poulton* v. *L. & S. W. Rail. Co.* (*k*), a station-master having demanded payment for the carriage of a horse conveyed by defendant company, arrested and detained plaintiff for non-payment thereof until it was ascertained by telegraph that all was right. The railway company had no power to arrest for non-payment of carriage. Therefore, the station-master, in arresting plaintiff, did an act which was wholly illegal, not merely in the mode of doing it, but in the doing of it at all. Held, the railway company were not liable; and Blackburn, J., distinguished this case from *Limpus* v. *London General Omnibus Co.*, pointing out that there "the act done by the driver was within the scope of his authority, though, no doubt, it was a wrongful and improper act, and therefore his masters were responsible for it. In the present case, an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station-master any power to do the act. Therefore the wrongful imprisonment is an act for which the plaintiff, if he

Co. (1908), 24 T. L. R. 593. Cf. *Hambro* v. *Burnand* (1904) 2 K. B. 10.

(*k*) (1867), L. R. 2 Q. B. 534.

has a remedy at all, has it against the station-master personally, but not against the railway company" (*l*).

In *Abrahams* v. *Deakin* (*m*), the plaintiff had offered the defendant's barman a ten-mark piece, and on its being refused, gave a half-sovereign in its place, for which he received change. Subsequently the manager of defendant's bar followed the plaintiff and gave him in charge for attempting to pass bad money. Held, that defendant was not liable, for the manager had no implied authority to arrest the plaintiff, as the defendant's property was no longer in danger, and the arrest was made only in order to vindicate the law by punishing plaintiff for a criminal offence which he was supposed to have already committed.

Notice four cases on the liability of a railway company for the acts of its servants, two in which the company were held liable, two in which they were not.

Company held liable:—

Bayley v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (*n*): Porter pulls plaintiff out

(*l*) (1862), L. R. 2 Q. B. p. 540. Cf. *Compton-Smith* v. *L. & S. W. Ry. Co.*, Times for May 29th, 1897; 52 & 53 Vict. c. 57, s. 5; and *Denaby, &c., Collieries* v. *Yorkshire Miners' Assn.* (1906) A. C. 384.

(*m*) (1891) 1 Q. B. 516 (C. A.); 60 L. J. Q. B. 238. See also *Hanson* v. *Waller* (1901) Q. B. 390, and *Sanderson* v. *Collins* (1904) 1 K. B. 628, distinguishing *Coupé Co.* v. *Maddick* (1891) 2 Q. B. 413 (where the liability was in contract).

(*n*) (1872, 1873), L. R. 7 C. P. 415.

of carriage, thinking he was in the wrong train. Company held liable, on the ground that porter was acting within his general authority. *Goff* v. *G. N. Rail. Co.* (*o*): Company held liable for arrest of plaintiff by mistake of company's servants, servants having authority to arrest for non-payment of fare.

Company not liable :—

Allen v. *L. & S. W. Rail. Co.* (*p*): Company's booking-clerk gave into custody a person suspected of robbing the till, after the attempt had ceased. Held, there was no implied authority for the act, and therefore the company was not liable. *Edwards* v. *L. & N. W. Rail. Co.* (*q*): Defendant company's servant in charge of station arrests plaintiff on suspicion of having stolen company's goods. Company held not liable, servant's act being plainly beyond his authority—not part of the company's general business, nor for their apparent benefit.

The master, then, is liable for the wrongs of his servant committed in the course of his employment, and these may include wrongs resulting from the

(*o*) (1870), L. R. 6 Q. B. 65.

(*p*) (1861), 3 E. & E. 672.

(*q*) (1870), L. R. 5 C. P. 445. See also *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270, 277.

servant's disobedience to positive commands. In *Whatman* v. *Pearson* (*r*), a contractor forbade his workmen to leave their horses, or to go home during the dinner hour. Owing to disregard of this order, a horse which was left unattended ran away, and injured plaintiff's railings. The master was held responsible, on the ground that the workman was acting within the general scope of his authority to conduct the horse and cart during the day. On the other hand, where the enterprise is entirely the servant's, so that he may be said to be out "on a frolic of his own" (*s*), the master is not liable. In *Storey* v. *Ashton* (*t*), a carman, while out on his employer's business, at the request of a fellow-servant, went out of his way to fetch something for the latter. While so doing, he ran over the plaintiff. Upon these facts the master was held not liable.

So the employer is liable for the frauds of his servant committed without his authority, but in

(*r*) (1868), L. R. 3 C. P. 422. See also *Englehart* v. *Farrant & Co.* (1897) 1 Q. B. 240, and cf. *Limpus* v. *London General Omnibus Co.*, *supra*, p. 34 ; *Malcolm* v. *Waterhouse* (1908), 24 T. L. R. 854.

(*s*) Per Parke, B., in *Joel* v. *Morrison* (1834), 6 C. P. 501.

(*t*) (1869), L. R. 4 Q. B. 476. See also *Rayner* v. *Mitchell* (1877), 2 C. P. D. 357 ; *Sanderson* v. *Collins* (1904) 1 K. B. 628 ; *Cheshire* v. *Bailey* (1905) 1 K. B. 237 ; and compare *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318, with *Ruddiman* v. *Smith* (1889), 60 L. T. 708.

the course of his service, and for the employer's purposes (*u*). But the employer is not liable for the frauds of his servant committed in the course of his employment for the servant's own private ends (*x*).

Where an accident occurred through the negligence of a person who was servant of both parties, the defendant was held liable because at the time the servant was so negligent he was only acting as the defendant's servant (*y*).

II. Who is to be deemed a servant?

As stated above (*z*), a man is liable for the wrongs of his servants committed in the course of their employment, but as a general rule (*a*) he is not liable for the wrongs of an independent contractor employed by him.

What, then, is an **independent contractor**, as distinguished from a **servant**? An **independent contractor is one who undertakes to produce a given result, without being in any way controlled as to the method by which he attains that result. A servant,**

(*u*) Per cur. in *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. at p. 265; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; *Refuge Assurance Co.* v. *Kettlewell* (1908) 1 K. B. 545; (1909) A. C. 243.

(*x*) See *Farquharson* v. *King* (1902) A. C. 325; *Anglo-American Oil Co.* v. *Manning* (1908) 1 K. B. 536.

(*y*) *The Egyptian* (1910) P. 38 (affirmed H. L. (1910), 79 L. J. P. 57).

(*z*) Pp. 33, 34.

(*a*) For the exceptions, see *infra*, pp. 41—44.

on the other hand, **is under the order and control of his master in respect of the means and methods used to attain the end for which he is employed** (*b*). In order to ascertain whether A. was B.'s servant the following questions are material: (1) Did B. engage A.? (2) Did B. pay A. his wages? (3) Could B. discharge A.? (4) Did B. give A. his orders? (*c*).

A person employing an independent contractor is not generally responsible for the wrongful acts or omissions of the contractor. In *Quarman* v. *Burnett* (*d*), the defendants hired horses and a coachman from C. and provided their own carriage and livery for the coachman, who received regular wages from C., and two shillings a week from the defendants. Owing to the coachman's negligence in leaving the carriage, the horse bolted, and the plaintiff was injured. The defendants were held not liable, as

(*b*) See the judgment of Compton, J., in *Sadler* v. *Henlock* (1855), 4 E. & B. 570, 578; and also *Johnson* v. *Lindsay* (1889) 23 Q. B. D. 608 (C. A.); *Donovan* v. *Laing, &c., Syndicate* (1893) 1 Q. B. 629 (C. A.); *Rex* v. *Solomons* (1909) 2 K. B. 980; but see *Doggett* v. *Waterloo Taxi-Cab Co.* (1910), 26 T. L. R. 491; and Pollock, 8th ed. p. 79. A consulting surgeon at a hospital is not a servant of the governors: *Hillyer* v. *St. Bartholomew's Hospital* (1909) 2 K. B. 820; but a harbour master is the servant of the harbour board: *E. London, &c., Bd.* v. *Caledonia Landing, &c., Co.* (1908) A. C. 271.

(*c*) See the observations of Bramwell, L.J., in *Swainson* v. *N. E. Ry. Co.* (1878), 47 L. J. Q. B. at p. 375.

(*d*) (1840), 6 M. & W. 499; see also *Jones* v. *Mayor of Liverpool* (1885), 14 Q. B. D. 890; *Jones* v. *Scullard* (1898) 2 Q. B. 565.

the coachman was not their servant, but the servant of C., an independent contractor.

In *Reedie* v. *L. & N. W. Rail. Co.* (*e*), defendant company agreed with certain contractors for the construction of the line; the company to have the general right of superintending the work, and the power of dismissing incompetent workmen. Owing to the negligence of the contractors' workman, plaintiff's husband was killed, and this was an action under Lord Campbell's Act (9 & 10 Vict. c. 93) against the company. Held, the company was not liable, as the workman was not their servant, but the servant of the independent contractors.

But the person employing the contractor is liable in five cases:

1. **When he personally interferes in the contractor's work.** In *Burgess* v. *Gray* (*f*), a contractor, employed by defendant to make a drain, left a heap of gravel by the roadside. Defendant paid a navvy to cart it away. This was not properly done, and plaintiff was consequently upset as he was driving home. Held, that the defendant was liable.
2. **When the thing contracted to be done is unlawful.** In *Ellis* v. *Sheffield Gas Consumers'*

(*e*) (1849), 4 Exch. 244.
(*f*) (1845), 1 C. B. 578.

Co. (*g*), defendant company, without the necessary special powers, employed a contractor to open trenches in the streets of Sheffield. Plaintiff was injured by falling over a heap of stones left by the contractor. The company was held liable for the contractor's wrongful act.

3. **When the thing contracted to be done, though lawful in itself, will naturally be attended by injurious consequences, unless effectually guarded against.** In *Bower* v. *Peate* (*h*), defendant employed a contractor to pull down an old house and erect a new one. The contractor expressly undertook to support plaintiff's house, and to be liable for all damage, but defendant was held liable for the damage done. In *Hughes* v. *Percival* (*i*), defendant employed a contractor to rebuild a house. The contractor's servants, in so doing, cut through a party-wall and injured plaintiff's house. Defendant

(*g*) (1853), 23 L. J. Q. B. 42.

(*h*) (1876), 1 Q. B. D. 321 ; and see *Odell* v. *Cleveland Ho.* (1910), 26 T. L. R. 410.

(*i*) (1883), L. R. 8 App. Cas. 443. See also *Black* v. *Christchurch Finance Co.* (1894) A. C. 48 ; *Hardaker* v. *Idle District Council* (1896) 1 Q. B. 335 ; *Penny* v. *Wimbledon Urban District Council and another* (1899) 2 Q. B. 72 ; *Holliday* v. *National Telephone Co., ibid.*, 392 ; *Maxwell* v. *British Thomson Houston Co.* (1902), 18 T. L. R. 278.

was held liable on the ground that the building operations in question were dangerous to plaintiff's house. **On the other hand, the person employing the contractor is not liable when the thing contracted to be done is lawful, and not necessarily dangerous** (*k*). Thus he is not liable for merely casual or collateral negligence on the part of the contractor's workmen, but only for damage caused by failure to take proper precautions in doing the work (*l*).

4. **When there is a statutory obligation to do the thing properly.** In *Hole* v. *Sittingbourne Rail. Co.* (*m*), the defendant company was authorized by statute to make an opening bridge over a navigable river. A contractor employed by the company made a bridge which would not open, and plaintiff's vessel was thereby prevented from navigating the river. The company was held liable.

5. **In cases under sect. 4 of the Workmen's Compensation Act, 1906** (*n*), which provides that where the "principal," as therein defined, employs a contractor, such contractor's servants are to be able to recover compensation under the Act from the

(*k*) *Butler* v. *Hunter* (1862), 31 L. J. Ex. 214.
(*l*) *Penny* v. *Wimbledon Urban District Council*, *supra*.
(*m*) (1861), 6 H. & N. 488.
(*n*) See p. 55, *infra*.

"principal" without prejudice, however, to the "principal's" right to be indemnified by the contractor, if the contractor is himself liable under the Act (*o*).

Liability of master to servant for injuries incurred by servant during service.

It will be convenient to consider this subject under three heads, viz.:—(1) The liability of the master at common law; (2) his liability under the Employers' Liability Act, 1880; (3) his liability under the Workmen's Compensation Act, 1906.

As will hereafter be seen, neither the Employers' Liability Act nor the Workmen's Compensation Act applies to servants of all kinds, but the definition of "workman" in the Workmen's Compensation Act is different from, and very much wider than, that in the Employers' Liability Act. The Workmen's Compensation Act does not repeal or amend the Employers' Liability Act, 1880, but is generally found a more valuable and convenient remedy.

1. **At common law** the master was only bound—
   1. To take care to provide competent fellow-servants;
   2. To take care to provide safe and efficient machinery, or, as it has been put, to take reasonable precautions to ensure his servants' safety;

(*o*) *Cooper & Crane* v. *Wright* (1902) A. C. 302.

3. Not to be guilty of personal negligence (*p*).

The mere relation of master and servant does not imply any agreement on the part of the master to warrant the servant against risks incidental to the employment. Thus, in *Priestley* v. *Fowler* (*q*), defendant's servant, whose thigh was fractured owing to the overloading of a cart in the charge of another servant, was held disentitled to recover damages. On the other hand, in *Mellors* v. *Shaw* (*r*), plaintiff, a miner, succeeded in an action against his masters for injuries caused by the unsafe condition of the mine; but there the plaintiff proved that the defendant knew of such unsafe condition.

This is a rule of the common law, but the first decision upon the point was in 1837, in *Priestley* v. *Fowler* (*supra*); and in 1868, in *Wilson* v. *Merry* (*s*), it was held to extend to injuries caused to a workman by a foreman or person occupying a position of superintendence in the same employment.

Independently, therefore, of the statutory law on

(*p*) *Williams* v. *Birmingham Battery Co.* (1899) 2 Q. B. 338. If a servant is missing, the master is under no duty to search for him. If, therefore, he dies in consequence, the master is not liable: *Bond* v. *Wilson* (1908), 24 T. L. R. 238.

(*q*) (1837), 3 M. & W. 1.

(*r*) (1861), 30 L. J. Q. B. 333.

(*s*) (1868), L. R. 1 Sc. & D. 326.

the subject, the position of a workman who has sustained personal injuries in the course of his employment is inferior to that of a stranger. For at common law it is open to the employer in any action brought against him by the workman not only to set up every defence which would be available against anyone not in his employment, but, in addition, where the injury was caused by the negligence of a fellow-servant of the workman, the employer can set up the so-called defence of "**common employment**," since the workman, in entering the employment, is presumed to have accepted this kind of risk (*t*).

A person who volunteers to assist servants engaged in their work becomes their fellow-servant so far as an action for personal injuries is concerned (*u*) ; but where a person aids the servants of another with such other's consent or acquiescence, not as a mere volunteer, but for the purpose of expediting some business of his own, he is not deemed a servant, and so can recover (*x*).

2. Employers' Liability Act, 1880 (*y*).

This Act was mainly directed against the defence

(*t*) *Coldrick* v. *Partridge* (1910) A. C. 77 ; *Waldron* v. *Junior Army and Navy Stores* (1910) 2 Ir. R. 381 ; but see *Britannic Merthyr Coal Co.* v. *David* (1910) A. C. 74.

(*u*) *Degg* v. *Midland Ry. Co.* (1857), 1 H. & N. 773.

(*x*) *Wright* v. *L. & N. W. Ry. Co.* (1876), 1 Q. B. D. 252.

(*y*) 43 & 44 Vict. c. 42.

of "common employment," and in cases to which it applies the effect of it is to place the workman in the same position as that of a stranger.

By its provisions any railway servant, or any person to whom the Employers and Workmen Act of 1875 applies—*i.e.*, any labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or person otherwise engaged in manual labour (not being a domestic or menial servant, or a seaman (*z*))—and the persons entitled in case of death of any such railway servant or person, are to have the same rights and remedies against the employer as if such railway servant or person had not been in his service, for any personal injury caused by any of the following reasons:—

(i) **By reason of any defect in the condition of the ways, works, machinery, or plant,** used in the employer's business, which defect was caused or remained undiscovered through the negligence of the employer, or of some person in his service whose duty it was to see to the condition of such things.

This applies when the defect arises either from original fault of the works, &c., or from want of repair (*a*). It also applies when

(*z*) This word has not the same meaning as the word "seaman" in the Merchant Shipping Acts: *Macbeth* v. *Chislett* (1910) A. C. 220.

(*a*) *Heske* v. *Samuelson* (1883), 12 Q. B. D. 30.

sound plant is unfit for the use to which it is put (*b*). A machine need not be in actual use to come within the Act (*c*).

(ii) **By reason of the negligence of a person in the service who had any superintendence entrusted to him whilst in the exercise of such superintendence.** Such person must be one whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour. But a man may be in the exercise of superintendence, though at the time voluntarily assisting in manual labour (*d*).

(iii) **By reason of the negligence of a person in the service, to whose orders the injured workman is, at the time of the injury, bound to conform, where the injury results from so conforming.**

(iv) **By reason of the act or omission of any person in the service done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions of the employer, or of some person duly delegated by him in that behalf, where the injury results from some impropriety or defect in the rules,**

(*b*) *Cripps* v. *Judge* (1884), 13 Q. B. D. 583.
(*c*) *Thompson* v. *City Glass Bottle Co.* (1902) 1 K. B. 233.
(*d*) *Osborne* v. *Jackson* (1883), 11 Q. B. D. 619.

bye-laws, or instructions. But no bye-law is to be deemed defective which shall have been approved as proper by any department of government under any Act of Parliament.

(v) **By reason of the negligence of a person in the service having the charge or control of any signal, points, locomotive engine, or train upon a railway.** This has been held applicable to a private railway (*e*).

Provided that in each of the above cases the workman injured cannot recover if he knew of the defect or negligence, and did not complain to the employer or some person superior to himself in the service, within a reasonable time, unless he was aware that the employer, or such superior, already knew of the said defect or negligence.

In *Thomas* v. *Quartermaine* (*f*), the plaintiff fell into an insufficiently-fenced cooling vat at the defendant's, his employer's, brewery. The jury found that both plaintiff and defendant knew of the defect. It was thereupon held by Bowen and Fry, L.JJ. (Lord Esher, M.R., dissentiente), that the maxim "*volenti non fit injuria*" applied, and therefore the plaintiff could not recover. This case was further discussed and explained in *Yarmouth* v. *France* (*g*),

(*e*) *Doughty* v. *Firbank* (1883), 10 Q. B. D. 358.
(*f*) (1886), 17 Q. B. D. 414; (1887), 18 Q. B. D. 685 (C. A.).
(*g*) (1887), 19 Q. B. D. 647.

where it was laid down "that if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. But the mere fact that the plaintiff knew of the danger, and yet incurred it, is not conclusive" (*h*). It is important to notice that the maxim is not "*scienti non fit injuria*" but "*volenti non fit injuria.*" "Mere knowledge of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim '*volenti non fit injuria*'" (*i*). Finally, it must be noticed that this interpretation of the law was expressly approved by the House of Lords in the case of *Smith* v. *Baker* (*k*). But in *Baddeley* v. *Earl Granville* (*l*) it was held that the maxim does not apply where the defendant has been guilty of a breach of duty imposed by statute. If the injury result in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right

(*h*) Per Lindley, L.J., at p. 659.

(*i*) Per Esher, M.R., at p. 657. See also Lord Herschell's judgment in *Membery* v. *G. W. Rail. Co.* (1889), 14 App. Cas. 179, 190.

(*k*) (1891) A. C. 325; and see *Britannic Merthyr Coal Co.* v. *David* (1910) A. C. 74.

(*l*) (1887), 19 Q. B. D. 423.

of action as the workman himself would have had—*i.e.*, the right of action given by Lord Campbell's Act (*m*) and the Act amending it (*n*).

The amount of damages recoverable is limited to a sum equal to the estimated earnings of a person in the grade, employment, and district of the person injured, during the three years immediately preceding the injury. "Section 3 of the Employers' Liability Act does not give a measure of damages, but the limit of maximum damages which may be awarded under that Act" (*o*).

If a penalty is payable under some other Act it must be deducted from the compensation, and it cannot be sued for if compensation has been awarded under this Act (*p*).

Notice of the injury must be given to the employer within six weeks. The action must be commenced within six months, and in the case of death within twelve months. But in the case of death, want of notice is immaterial if the judge thinks there is reasonable ground for not giving it. The notice (which must be in writing (*q*) though not necessarily in technical language (*r*)) must give

(*m*) 9 & 10 Vict. c. 93. See pp. 231—233, *infra*.
(*n*) 27 & 28 Vict. c. 95. See p. 232, *infra*.
(*o*) Per Cave, J., in *Borlick* v. *Head* (1885), 34 W. R. 102.
(*p*) Employers' Liability Act, 1880, s. 5.
(*q*) *Moyle* v. *Jenkins* (1881), 8 Q. B. D. 116.
(*r*) *Stone* v. *Hyde* (1882), 9 Q. B. D. 76.

the name and address of the party injured, and state in ordinary language the cause and date of the injury; and it must be served by delivering it at the place of business, or at the residence, of the employer or by sending it in a registered letter properly addressed to the employer at such place as aforesaid, or at his last-known place of business or residence. Defects or inaccuracy do not render the notice invalid, unless the judge believe (1) that the defendant is thereby prejudiced in his defence, and (2) that the defect or inaccuracy was for the purpose of misleading (*s*).

Actions under the Act must be brought in the County Court, but may be removed into a superior Court on the application of either party in the usual manner. Removal, however, will only be ordered under very exceptional circumstances (*t*).

A workman can contract himself out of the Act (*u*), and such a contract is a bar to any claim under Lord Campbell's Act.

The operation of the Employers' Liability Act, 1880, has been extended from year to year since the time when it would have originally expired in 1887.

3. Workmen's Compensation Act, 1906 (*x*).

This Act repealed the Workmen's Compensation

(*s*) *Carter* v. *Drysdale* (1883), 12 Q. B. D. 91.
(*t*) *Munday* v. *Thames Iron Works Co.* (1882), 10 Q. B. D. 59.
(*u*) *Griffiths* v. *Lord Dudley* (1882), 9 Q. B. D. 357.
(*x*) 6 Edw. VII. c. 58.

Acts, 1897 and 1900. It has, however, retained the radical changes introduced by these Acts, and has greatly extended their operation. The workman who comes within the Act is in a far more favourable position than a stranger. Three of the principal defences open to employers before 1898 are abolished in cases coming under the Act, for where a workman sues his employer for injuries sustained by an accident "arising out of and in the course of his employment" the latter cannot set up as a defence (i) "*volenti non fit injuria*" (*y*) or (ii) inevitable accident (*z*) or (iii) contributory negligence of the workman (*a*). Even the defence of "serious and wilful misconduct" allowed by the repealed Acts of 1897 and 1900 has been considerably curtailed (*b*).

The Workmen's Compensation Act of 1906 provides that any dispute which cannot be settled by agreement (*c*) shall be settled by "arbitration" in the County Court by the judge or some person whom he nominates (*d*). He may also appoint a

(*y*) See pp. 49, 50, *supra*.
(*z*) See pp. 28, 29, *supra*.
(*a*) See p. 209, *infra*.
(*b*) See p. 63, *infra*.
(*c*) See p. 64, *infra*.
(*d*) Sect. 1 (3) and Second Schedule. As he only sits as "arbitrator," he has no power to make an order for discovery of documents or to give leave to administer interrogatories: *Sutton* v. *G. N. Ry. Co.* (1909) 2 K. B. 791.

medical assessor to sit with the "arbitrator" (*e*). Appeals from that Court lie direct to the Court of Appeal, and thence to the House of Lords.

A person who claims to be entitled to compensation must, in order to make out his case, prove six things:—

(i) **That the workman was employed**, by the person against whom he claims, **under a contract of service.**

The Act is not limited to particular employments, as were the repealed Acts of 1897 and 1900, but applies to "any employment" (*f*), including seamen (*g*) and domestic servants. The chief exceptions are persons who earn over 250*l.* a year, and "casual" workmen. Thus, the injured workman must be employed under a **contract of service.** The mere fact that he was always sent for when certain work was to be done, or even that he came periodically without special instructions and did such work, is not enough of itself to make him a workman within the Act (*h*).

If a contract of service in fact exists, it is immaterial that the employer is a statutory body

(*e*) Second Schedule, para. 5, and W. C. Rules, 1907, r. 52.

(*f*) Sect. 13.

(*g*) Sect. 7. But see *Admiral Fishing Co.* v. *Robinson* (1910) 1 K. B. 540.

(*h*) *Hill* v. *Begg* (1908) 2 K. B. 802; but see *Dewhurst* v. *Mather* (1908) 2 K. B. 754. See also *Rennie* v. *Reid* (1908) S. C. 1051; *Bargewell* v. *Daniel* (1908), 98 L. T. 257; *Johnston* v. *Monastereran General Store* (1909) 2 Ir. R. 108.

created expressly to provide work for unemployed workmen, of whom the applicant was one (*i*). But a charitable organisation which gives food and lodging in return for work done does not employ those whom it relieves, for there is no obligation on either side to employ or to serve (*k*).

A person who contracts to do work to bring about a designated end in his own way is not a workman. Thus a medical officer, appointed by guardians under their statutory powers, is not within the Act (*l*), nor is a lecturer engaged to explain the working of machinery to visitors at an exhibition (*m*); but a professional football player is (*n*).

The Act makes special provision for the case of workmen employed by sub-contractors (*o*).

(ii) That the service was in the United Kingdom (*p*), or on a British merchant ship (*q*).

(*i*) *Porton Central (Unemployed) Body for London* (1909) 1 K. B. 173; *Gilroy* v. *Mackie* (1909) S. C. 166.

(*k*) *Burns* v. *Manchester & Salford Mission* (1908), 99 L. T. 574.

(*l*) *Murphy* v. *Enniscorthy Guardians* (1908) 2 Ir. R. 609.

(*m*) *Waites* v. *Franco-British Exhibition* (1909), 25 T. L. R. 441. See also *Simmons* v. *Heath Laundry Co.* (1910) 1 K. B. 543.

(*n*) *Walker* v. *Crystal Palace Football Co.* (1910) 1 K. B. 87.

(*o*) Sect. 4; and see *Andrews* v. *Andrews* (1908) 2 K. B. 567; *Marks* v. *Caine* (1909) 2 K. B. 516; *Mulrooney* v. *Todd* (1909) 1 K. B. 165.

(*p*) *Tomalin* v. *Pearson* (1909) 2 K. B. 61; but see the Workmen's Compensation (Anglo-French Convention) Act, 1909 (9 Edw. VII. c. 16), which in effect enables English workmen injured in France to avail themselves of the rights of injured French workmen, and French workmen injured in England to obtain compensation under the Act of 1906.

(*q*) Sect. 7.

(iii) That the workman was injured by accident.

The Courts have construed the word "accident" in a very wide sense, but not every injury which a workman suffers in the course of his employment is an accident. Thus, poisoning by sewer gas was held not to be an accident, where the workman was a sewerman (*r*). But an unlooked-for mishap, which would not have occurred had the workman been in a normal state of health, is an accident. Thus, where a fireman on board ship was overcome by a "heat stroke," which most probably he would not have suffered if he had been in good health, was held to be within the rule (*s*). A nervous shock is such an injury (*t*).

The applicant must prove that the accident was the cause of the injury. Thus, where an accident caused loss of sight, and the loss preying on the workman's mind caused insanity, during which he committed suicide, it was held that the death was a direct consequence of the accident (*tt*). So, too, where one operation was not successful, and the workman died during a second operation, under-

(*r*) *Broderick* v. *L. C. C.* (1908) 2 K. B. 807 ; and see *Steel* v. *Cammell Laird* (1905) 2 K. B. 232.

(*s*) *Ismay* v. *Williamson* (1908) A. C. 437 ; and see *Clover* v. *Hughes* (1910) A. C. 242 ; *Morgan* v. *Zenaida S.S.* (1909), 25 T. L. R. 446 ; *McInnes* v. *Dunsmuir* (1908) S. C. 1021 ; and *Sheerin* v. *Clayton* (1910) 2 Ir. R. 105.

(*t*) *Yates* v. *South Kirby Collieries* (1910), 26 T. L. R. 596.

(*tt*) *Malone* v. *Cayzer* (1908) S. C. 479 ; and see *Dunham* v. *Clare* (1902) 2 K. B. 292.

taken to complete the cure, it was held that the death resulted from the accident (*u*). If a workman is injured and receives compensation according to the Act, and then dies, his employers are not prevented from resisting a claim by his dependants (*x*) on the ground that the death did not result from the accident but from some other cause (*y*).

Certain "industrial diseases" are now made "accidents" by the Act (*z*), but only workmen in the trades where they are prevalent can claim in respect of them (*a*).

(iv) That the accident arose out of the workman's employment, and also in the course of that employment.

Both these conditions must be fulfilled (*b*). Consequently, an accident due to an event likely to occur to anyone, *e.g.*, by lightning, will only give the workman a right to compensation if he can show that the nature of his employment exposed him to a greater risk than the risk incurred by a mere passer-by (*c*).

(*u*) *Shirt* v. *Calico Printers* (1909) 2 K. B. 51.

(*x*) See p. 60, *infra*.

(*y*) *Cleverley* v. *Gas Light and Coke Co.* (1907), 24 T. L. R. 93 (H. L.).

(*z*) Sects. 8 and 10, Third Schedule and Orders extending the Schedule; but see *Haylett* v. *Vigor* (1908) 2 K. B. 837.

(*a*) *Curtis* v. *Black* (1909) 2 K. B. 529.

(*b*) *Fenton* v. *Thorley* (1903) A. C. 443.

(*c*) *Andrew* v. *Failsworth* (1904) 2 K. B. 32; *Challis* v. *L. & S. W. Ry. Co.* (1905) 2 K. B. 154.

Whether the accident did arise out of and in the course of the employment is a question of law, so that an appeal lies against any decision on this question (*d*).

The *onus* of proof lies on the applicant (*e*), and, consequently, if there is nothing to show how and when the accident happened, the claim fails. But the burden seems to be easily discharged (*f*). *Primâ facie*, an accident occurring to a workman after his work is not within the Act, but where it is an implied term in the service that the employer shall provide his workmen with means of conveyance to and from the place of business accidents during the journey are included (*g*). So, too, if the workman is injured on the premises while leaving them by the usual way (*h*); or while going to receive his pay (*i*); or when eating his dinner on the premises in accordance with his custom (*k*).

If, however, the accident does not happen in the

(*d*) *Gane* v. *Norton Hill, &c., Co.* (1909) 2 K. B. 539.

(*e*) *Pomfret* v. *Lancs. and Yorks. Ry. Co.* (1903) 2 K. B. 718; *M'Donald* v. *Banana S.S.* (1908) 2 K. B. 926; *Bender* v. *Zent* (1909) 2 K. B. 41; *Marshall* v. *White Rose S.S.* (1909) K. B. 2 46 (affirmed H. L. (1910) W. N. 179); but see *Grant* v. *Glasgow and S. W. Ry. Co.* (1908) S. C. 87.

(*f*) *Rice* v. *Swansea Vale S.S.* (1910), 26 T. L. R. 276.

(*g*) *Cremin* v. *Guest* (1908) 1 K. B. 469.

(*h*) *Gane* v. *Norton Hill, &c., Co., supra*; but see *Anderson* v. *Fife Coal Co.* (1910) S. C. 8.

(*i*) *Long* v. *Sheffield Coal Co.* (1907), 25 T. L. R. 142.

(*k*) *Rowland* v. *Wright* (1909) 1 K. B. 963; but see *Brice* v. *Lloyd* (1909) 2 K. B. 804.

course of his employment and also arise out of it, the Act does not apply. Thus, a newly engaged hand who is injured on his way to commence work (*l*), or a workman who has left off work and is injured while rescuing a fellow workman who is in peril while at work away from the master's premises (*m*), has no claim to compensation. And the same rule applies to one who is injured while returning to work after an absence on his own affairs (*n*). A mere breach of discipline is not enough upon which to hold that the accident did not arise out of and in the course of his employment (*o*).

Similarly if a workman is injured while at work as a consequence of practical joking on the part of his fellow workmen (*p*), or by an insect flying in his face and injuring his eyesight (*q*), he has no claim, for neither accident arises "out of" his employment.

(*l*) *Whitbread* v. *Arnold* (1908), 98 L. T. 103.

(*m*) *Mullen* v. *Stewart* (1908) S. C. 991. It would be different if he were injured on the premises while voluntarily helping in an emergency. *Hapelman* v. *Poole* (1909), 25 T. L. R. 155.

(*n*) *Reed* v. *G. W. Ry. Co.* (1909) A. C. 31; *Brice* v. *Lloyd*, *supra*; *Gilbert* v. *Nizam* (1910), 26 T. L. R. 604; but see *Low* v. *General Steam Fishing Co.* (1909) A. C. 523; *Hewett* v. *Duchess S.S.* (1910) 1 K. B. 772.

(*o*) *Robertson* v. *Allen* (1908), 77 L. J. K. B. 1072; *Moore* v. *Manchester Liners* (1910) "Times" Newspaper, July 19 (H. L.). As to "serious and wilful misconduct," see p. 63, *infra*.

(*p*) *Armitage* v. *Lancs. and Yorks. Ry. Co.* (1902) 2 K. B. 178; *Fitzgerald* v. *Clark* (1908) 2 K. B. 796; *Burley* v. *Baird* (1908) S. C. 545.

(*q*) *Craske* v. *Wigan* (1909) 2 K. B. 635.

(v) **That the applicant is a dependant**, that is, that he is a member of the workman's family and dependent upon his earnings for his livelihood (*r*).

This can only be material in the case of a dead workman, for, if alive, he alone has a right under the Act.

The applicant may, however, be the workman's personal representative, or one of his dependants, claiming on behalf of all the dependants, for there is only one arbitration and one amount awarded, which is apportioned between the persons who are adjudged to be the "dependants."

The Act includes as "dependants" illegitimate children (*s*), and the "natural" relatives of illegitimates, but not the husband or wife of such a relative (*t*).

Dependants may be either wholly or partially dependent upon the deceased's earnings, and different considerations apply to each of these cases (*u*). On the death of a dependant before receiving the amount due, his right does not lapse, but passes to his personal representatives (*x*).

(*r*) Sect. 13.

(*s*) Including posthumous illegitimate children: *Orrell Colliery Co.* v. *Schofield* (1909) A. C. 433.

(*t*) *McLean* v. *Moss Bay Iron, &c., Co.* (1909) 2 K. B. 521; but see the case in the next note.

(*u*) Sect. 13, and First Schedule, para. 1; *Hodgson* v. *West Stanley Colliery* (1910) A. C. 229.

(*x*) *United Collieries* v. *Simpson* (1909) A. C. 383.

(vi) **The amount of compensation due.**

(1) If the workman is dead, and the dependants were wholly dependent upon him, they are entitled to an amount equalling 156 times his average weekly wages; but in no case more than 300*l.* or less than 150*l.* (*y*). If partially dependent, then the compensation is assessed according to the extent to which they were dependent upon him.

(2) If he is (alive but) totally disabled, then the compensation is a weekly sum equal to half his weekly wages; but in no case more than 1*l.* a week (10*s.* if the workman is an infant) (*z*).

(3) If he is (alive but) only partially disabled, then the amount is a weekly sum equal to half the difference between his average weekly earnings and the wage he now earns or is capable of earning (*a*).

The rules for ascertaining the amount of compensation are not to be applied inflexibly. The circumstances of each case must be taken into account (*b*). Thus, if it is an implied term of the service that the servant shall be at liberty to receive tips, the amount he so receives must be taken into account in ascertaining his weekly earnings (*c*). So, too, must the value of food and other allowances

(*y*) First Schedule and Workmen's Compensation Rules, 1907.

(*z*) *Ibid.*

(*a*) *Ibid.* And see *Eyre* v. *Houghton Main Colliery Co.* (1910) 1 K. B. 695 (affirmed, H. L. 26 T. L. R. 302).

(*b*) *Perry* v. *Wright* (1908) 1 K. B. 441.

(*c*) *Penn* v. *Spiers and Pond* (1908) 1 K. B. 766.

to which he is entitled from his master (*d*). But poor relief is in no sense earnings (*e*). Earnings from service with other employers is included (*f*), but only if earned as a workman (*g*). Absence from work is only to be taken into account if it is in accordance with the custom of the trade; not if voluntary or through sickness (*h*).

If, at any time (*i*), the employer thinks a disabled workman has recovered either wholly or to such an extent as to be capable of earning more money than he was when the award was made, he can apply for a revision of the award (*k*). If the arbitrator thinks the workman has recovered but may have a relapse, he should not put an end to the award, but reduce it to a nominal amount, so that the workman can, in his turn, apply for a revision if he again becomes incapable as a result of his injury (*l*).

(*d*) *Dothie* v. *MacAndrew* (1908) 1 K. B. 803; but see *Simmonds* v. *Stourbridge, &c., Clay Co.* (1910), 26 T. L. R. 430.

(*e*) *Gilroy* v. *Mackie* (1909) S. C. 466.

(*f*) First Schedule, para. 2.

(*g*) *Simmons* v. *Heath Laundry Co.* (1910) 1 K. B. 543; and see *Paterson* v. *Moore* (1910) S. C. 29. As to deductions, see *Abram Coal Co.* v. *Southern* (1903) A. C. 306; *Midland Ry. Co.* v. *Sharpe* (1904) A. C. 349; and *McKee* v. *Stein* (1910) S. C. 38.

(*h*) *Anslow* v. *Cannock Chase Colliery Co.* (1909) A. C. 435.

(*i*) For the question can never be *res judicata*: *Radcliffe* v. *Pacific S. N. Co.* (1910) 1 K. B. 235.

(*k*) First Schedule, para. 3 and 16; *Charing Cross, &c., Ry. Co.* v. *Boots* (1909) 2 K. B. 640; *Upper Forest, &c., Tinplate Co.* v. *Thomas* (1909) 2 K. B. 631. The onus of proving this lies on the employer: *Eaves* v. *Blaenclydach Colliery Co.* (1909) 2 K. B. 73; *M'Callum* v. *Quinn* (1909) S. C. 227.

(*l*) *Tynron* v. *Morgan* (1909) 2 K. B. 6; *Evans* v. *Vickers*

Even after proving all these things, an applicant may not succeed, for it may be proved—

That the applicant has disentitled himself to compensation.

(1) If the workman is neither killed nor suffers "serious and permanent disablement," the employer can escape liability by showing that the accident happened through the workman's own "serious and wilful" misconduct (*m*).

(2) Again, he may prove that the workman has contracted himself out of the Act by assenting to a scheme, which the Registrar of Friendly Societies has certified to be, on the whole not less favourable to the workman than the Act (*n*). And in such a case the workman has only the remedies provided by the scheme.

(3) The Act also provides that a workman, who refuses to permit his employer's medical adviser to examine him, shall have his right to compensation suspended during such refusal (*o*). But it must be an absolute refusal. Merely refusing unless his own medical attendant is present is not enough (*p*).

(1910) 1 K. B. 554 (affirmed H. L. (1910), 26 T. L. R. 548). A general fall in wages does not entitle a workman to a revision: *Black* v. *Merry* (1909) S. C. 1150; and see *Boag* v. *Lockwood Collieries* (1910) S. C. 51.

(*m*) Sect. 1 (2) (*b*); and see *George* v. *Glasgow Coal Co.* (1908) A. C. 123; *Leishman* v. *Dixon* (1910) S. C. 498.

(*n*) Sect. 3. A certificate under the repealed Act of 1897 is not enough: *Moss* v. *G. E. Ry. Co.* (1909) 2 K. B. 274.

(*o*) First Schedule, para. 4, and see para. 14, 15.

(*p*) *Devitt* v. *Bainbridge S.S.* (1909) 2 K. B. 802.

(4) To the last instance, the Courts have added another, which is not in the Act. If a workman unreasonably (*q*) refuses to undergo an operation, which the Court is satisfied will cure him (*r*), he forfeits his claim to compensation (*s*).

(5) An applicant cannot claim compensation after having accepted a sum in satisfaction (*t*).

Proceedings under the Act are only necessary if the parties cannot agree. But any agreement must be recorded in the County Court, and in certain cases, the Registrar has power to refuse to register an agreement which he considers to be unfair to the workman (*u*).

(6) The applicant must give notice, in writing (*x*), of the accident to the employer as soon as practicable; but want of, or defect or inaccuracy in, such notice is not a bar if the employer is not prejudiced in his defence, or would not be if an adjournment is granted, or if such want, defect or inaccuracy was

(*q*) *Tutton* v. *Majestic S.S.* (1909) 2 K. B. 54.

(*r*) The onus of proving this lies on the employer: *Marshall* v. *Orient S. N. Co.* (1910) 1 K. B. 79.

(*s*) *Warnecken* v. *Moreland* (1909) 2 K. B. 184; *Donelly* v. *Baird* (1908) S. C. 586.

(*t*) Sect. 1 (3); and see *Mackay* v. *Reid* (1908) S. C. 174.

(*u*) Second Schedule, para. 9; and see *Rhodes* v. *Southill Colliery Co.* (1909) 1 K. B. 191; *Mulholland* v. *Whitehaven Colliery Co.* (1910), 26 T. L. R. 462.

(*x*) *Hughes* v. *Coed Talon Colliery Co.* (1909) 1 K. B. 957.

occasioned by mistake, absence from the United Kingdom or other reasonable cause (*y*).

(7) The applicant is also bound to give notice in writing of the accident as soon as practicable after it has occurred, and to make a claim within six months after the accident, or if the accident results in death, within six months after the death (*z*). The claim need not be for a specific sum (*a*).

But want of or defect or inaccuracy in any notice or claim is not to be a bar unless the employer is prejudiced thereby (*b*).

(8) Lastly, the applicant must not have exercised any other remedy inconsistent with his right to compensation under the Act.

(a) **Against his employer.** If the injury is so caused as also to give the workman a right to damages at common law or under the Employers' Liability Act, 1880 (*c*), he can, at his option (*d*), bring an action for damages instead of claiming compensation (*e*). If he does so, and it is held that he has no right to damages but has a claim for

(*y*) Sect. 2 (1) (*a*); *Peggie* v. *Wemyss Coal Co.* (1910) S. C. 93.
(*z*) Sect. 2 (1).
(*a*) *Thompson* v. *Goold* (1910), 26 T. L. R. 526 (H. L.); overruling *Kilpatrick* v. *Wemyss Coal Co.* (1907) S. C. 320.
(*b*) Sect. 2 (1) (*a*) and (*b*).
(*c*) See *supra*, pp. 44—52.
(*d*) As to what is an exercise of the option, see *Cribb* v. *Kynoch* (1908) 2 K. B. 551; and *Mackay* v. *Rose* (1908) S. C. 174.
(*e*) Sect. 1 (2) (*b*).

compensation, he can have the amount of the latter assessed and awarded to him in the action itself (*f*).

(b) **Against third persons.** If the injury is caused in such a way as also to give a right of action against a third person, the workman can both bring an action and claim compensation (*g*). But he cannot recover both ; so that if either his employer or the defendant compromise one, the proceedings in respect of the other claim are barred (*h*).

Even if the employer is insolvent, the workman entitled to compensation does not lose his rights; for the Act expressly provides that, if an employer is adjudicated bankrupt or makes a composition or arrangement with his creditors (or, if a company, commences to be wound up), the rights of the employer in respect of any insurance against liability under the Act are transferred to his workmen who are entitled to compensation, but not so as to increase the liability of the insurers (*i*).

If the accident was caused by the negligence of a fellow workman the employer has a right to be indemnified by the fellow workman in respect of the compensation due to the injured man (*k*).

(*f*) Sect. 1 (4) ; but he may have to submit to the defendant's costs in the action being deducted from the amount awarded: *Cohen* v. *Seabrook* (1909), 25 T. L. R. 176. (*g*) Sect. 6.

(*h*) *Page* v. *Burtwell* (1908) 2 K. B. 758 ; *Oliver* v. *Nautilus S.S.* (1903) 2 K. B. 639 ; and see *Huckle* v. *London C. C.* (1910) 26 T. L. R. 580.

(*i*) Sect. 5. (*k*) *Gibson* v. *Dunkerley* (1910) 102 L. T. 587.

CHAPTER V.

OF WRONGS TO PROPERTY.

A. Of Wrongs to Real Property.

Trespass is the wrongful and unwarrantable entry upon the soil or land of another person.

The essential to constitute trespass is therefore **entry**, which may be either **actual** or **constructive.**

Constructive entry may be roughly described as every interference with the land of another—*e.g.*, throwing rubbish or pouring water on your neighbour's land.

Neither force nor unlawful intention, nor actual damage, nor the breaking of an inclosure, is necessary to constitute a trespass.

Besides bringing an action for damages, the person whose land is trespassed upon may—

1. Forcibly defend his possession against a trespasser;
2. Forcibly eject him.

In neither case, however, must unnecessary violence be used.

To maintain an action for trespass, plaintiff must

prove that at the time the wrong was committed he had possession, which may be actual or constructive.

Constructive possession means either the possession of an agent or servant, or an immediate right to possess, or possession conferred by law in certain cases independently of any physical apprehension or transfer (*a*). By means of the doctrine of constructive possession the strictly possessory remedies were largely extended in favour of owners not themselves in actual possession.

The actual occupier of real property is always entitled to maintain an action for trespass thereon. On the other hand, the owner who has parted with possession in favour of a tenant or lessee, cannot maintain an action for trespass (*b*) ; he is, however, entitled to bring an action for injury done to his reversionary estate, provided that such injury is of a permanent nature, and deteriorates the marketable value of the property (*c*). In such cases the tenant

(*a*) *Smith* v. *Milles* (1786), 1 T. R. 480 ; cf. *Glynn* v. *Howell* (1909) 1 Ch. 666. See also Pollock, 8th ed. p. 345, note (*m*) ; and upon the whole of this difficult and complicated subject, see "An Essay on Possession in the Common Law," by Sir Frederick Pollock and the late Mr. Justice Wright.

(*b*) *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72 ; *Mayfair Property Co.* v. *Johnston* (1894) 1 Ch. 508.

(*c*) *Tucker* v. *Newman* (1839), 11 A. & E. 40. This, under the old system of pleading, would have been an action on the case.

is entitled to sue in respect of the immediate injury, and the reversioner in respect of the diminished saleable value of the reversion.

Where a person who has a limited right of entry upon lands exceeds that right, he is a trespasser. The right of the public to use a highway is such a limited right. "The interest of the public in a highway consists solely in the right of passage; the soil and freehold over which that right of way is exercised is vested in the owner or owners of the adjoining land, who may maintain actions of trespass against persons infringing his or her rights of trespass therein, as, for instance, by permitting cattle to depasture thereon" (*d*) or by using the soil of the highway for the purpose of interfering with the exercise by the owner of the adjoining land of his legal right of sporting over such land (*e*) or of prying into his occupations (*f*).

The defences to an action for trespass are :—

1. **On the ground of necessity,** *e.g.*, to escape some pressing danger (*g*).

(*d*) Per Lopes, L.J., in *Harrison* v. *Duke of Rutland* (1893) 1 Q. B. at p. 152; and cf. *Fitzhardinge* (*Lord*) v. *Purcell* (1908) 2 Ch. 139; *Brighton Corporation* v. *Packham* (1908), 72 J. P. 318.

(*e*) *Harrison* v. *Duke of Rutland* (1893) 1 Q. B. 142. The same rule applies to navigation in a harbour: *Denaby, &c., Collieries* v. *Anson* (1910), 26 T. L. R. 310.

(*f*) *Hickman* v. *Massey* (1900) 1 Q. B. 752.

(*g*) *Cope* v. *Sharp* (1910) 1 K. B. 168.

2. **Leave and licence**, by implied invitation, as entering a shop or inn.
3. **Liberum tenementum**, that it is the defendant's land. This raises the question of title. Therefore the action of trespass is a convenient method for trying the question of title to lands.
4. **By authority of law**—*e.g.*, entry to serve legal process, or to distrain (*h*).
5. **To re-take one's goods or cattle**, but entry is not justified by the mere fact that defendant's goods or cattle are there. It must be shown that they came there by plaintiff's act, or that they had been stolen from defendant.
6. **To abate a nuisance**, after notice (*i*).
7. **On the ground of some special property or easement.**

But it is never a defence that the defendant trespassed innocently and without any intention of so doing (*k*).

Joint tenants, or tenants in common, can only sue one another in trespass when the act complained of is inconsistent with the complaining party's right—*e.g.*, carrying off the soil.

(*h*) The fact that "peaceful picketing" was made lawful by the Trade Disputes Act, 1906, does not authorize entry upon private property: *Larkin* v. *Belfast Harbour Commrs.* (1908) 2 Ir. R. 214.

(*i*) See *infra*, p. 91.

(*k*) See *Clissold* v. *Crutchley* (1910), 2 K. B. 244 (C. A.).

By the statute 21 Jac. 1, c. 16, s. 3, actions for trespass must be brought within six years next after the cause of action arose.

Dispossession is wrongfully keeping possession of land from its rightful owner.

Former remedy—Action of ejectment.

Now by the Judicature Act, 1873—Action to recover the land. Plaintiff must recover by the strength of his own title, not by the weakness of his adversary's, *e.g.*, mere possession is *prima facie* evidence of title until the claimant makes out a better one; or the defendant may plead jus tertii—*i.e.*, the right of a third person—but the claimant cannot assert *jus tertii* in support of his claim; possession being a good title against all except the true owner.

By the Statutes of Limitation (*l*) no action lies for the recovery of land or rent, unless brought within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims. Where, however, the claimant or any person through whom he claims has been deprived of such land or rent by the concealed fraud of the person in possession, or any person through whom he claims, the statute does not begin to run until "the time when such fraud shall or with reasonable diligence might have been first known or

(*l*) 37 & 38 Vict. c. 57, ss. 1, 9.

discovered (*m*). Claimants under the disability of infancy, coverture, or unsound mind, may bring their action within six years after such disability has ceased. But in no case can any such action be brought after thirty years, except in the case of concealed fraud. The statute provides that time may be prevented from running by acknowledgments in writing duly signed.

A lawful owner out of possession may peaceably enter, but must not use force. If he does so, though technically he cannot be liable for a trespass on his own land, the better opinion appears to be (though it is by no means free from doubt) that he will be liable for assault, and, in addition, a forcible entry of this kind is an offence against 5 Ric. 2, c. 18, s. 1 (*n*).

To make a man a trespasser ab initio, two things must always concur:—

1. **There must be a misfeasance.**
2. **The rights infringed must be given by the law, and not by an individual.**

In *The Six Carpenters' Case* (*o*), six carpenters

(*m*) 3 & 4 Will. 4, c. 27, s. 26; *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59; but see *Betjemann* v. *Betjemann* (1895) 2 Ch. 475.

(*n*) See Pollock, 8th ed. pp. 383–386; *Beddall* v. *Maitland* (1881), 17 Ch. D. 174; *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199. As to what constitutes forcible entry, see *Jones* v. *Foley* (1891) 1 Q. B. 730.

(*o*) (1611) 1 Sm. L. C., 11th ed. p. 132.

entered a London tavern, ordered and paid for wine, then ordered more which they did not pay for. Was their original entry rendered tortious by this refusal? No; for such refusal was a mere non-feasance. Notice that the reason why misfeasance does not make a man a trespasser *ab initio* when the authority is conferred by an individual is that such authority can be limited or recalled at will, whereas rights given by law require to be more strictly protected.

According to the above rule, a misfeasance in distraining would make a landlord a trespasser *ab initio*, which would obviously work great hardship. Therefore a remedial statute, **11 Geo. 2, c. 19, s. 19**, provides that where a distress is made for rent justly due, and an irregularity afterwards occurs on the landlord's part, the distress is not on that account to be deemed unlawful, nor the person making it a trespasser *ab initio*.

The words on notice boards, "Trespassers will be prosecuted," are, "if strictly construed, a wooden falsehood" (*p*), as trespass is not a crime, and were originally intended to secure costs under certain statutes, which provided that in actions for trespass, when less than 40*s*. was recovered, no more costs than damages should be allowed, unless

(*p*) Maitland's "Justice and Police" (English Citizen Series), p. 13.

the judge certified that the action was brought to try a right, or that the trespass was "wilful and malicious." Trespass after notice not to trespass on plaintiff's lands was held to be wilful and malicious, and special communication of such notice to defendant was not required (*q*).

When a person has been injured on the land of another, his position with regard to the question whether he can maintain an action in respect of such injuries will depend upon whether, at the time of his sustaining such injury, he was—

1. A trespasser;

2. A licensee; or

3. A person coming on lawful business.

1. A trespasser cannot maintain an action where the "unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction" (*r*); *e.g.*, if he tumbles into a hole or unguarded pit, "he has no remedy for any injury suffered thereby, as the hurt is in such case caused by his own carelessness and misconduct" (*s*). So, too, if a ferocious bull gores him he has no right to damages (*t*). On the other hand, he can maintain an action where the unlawful act or conduct on

(*q*) *Bowyer* v. *Cook* (1847), 4 C. B. 236.

(*r*) Pollock, 8th ed. p. 177.

(*s*) Per Wilde, B., in *Bolch* v. *Smith* (1862), 7 H. & N. 736.

(*t*) *Lovery* v. *Walker* (1910) 1 K. B. 173. As to injuries by animals generally, see p. 219, *infra*.

his own part is not so connected with the harm suffered by him as to be part of the same transaction; *e.g.*, if, whilst he is trespassing, the owner of the land comes and knocks him down or assaults him without any provocation or excuse.

In *Ilott* v. *Wilkes* (*u*), it was held that a trespasser, with notice that spring-guns were set on the land he trespassed on, could not recover for injuries caused by such guns, on the ground that he voluntarily exposed himself to the mischief complained of. On the other hand, in *Bird* v. *Holbrook* (*x*), a trespasser wounded in similar circumstances, but without such notice, was held entitled to recover. In consequence of the former case, setting spring-guns except by night in a dwelling-house for the protection thereof was made a criminal offence by 7 & 8 Geo. 4, c. 18, now repealed and substantially re-enacted by **24 & 25 Vict. c. 95, s. 1, and c. 100, s. 31.**

By the General Highway Act (5 & 6 Will. 4, c. 50), s. 70, it is illegal to sink a pit, or erect a steam or other like engine, gin or machinery attached thereto, **within 25 yards** of a carriage or cartway, unless concealed so as to prevent danger. The same Act also prohibits the erection of windmills **within 50 yards,**

(*u*) (1820), 3 B. & Ald. 304; 22 R. R. 400. See also *Ponting* v. *Noakes* (1894) 2 Q. B. 281.

(*x*) (1828), 4 Bing. 628; 29 R. R. 657.

of furnaces within 15 yards, and letting off fireworks within 50 feet of a carriage or cartway. By the **Quarries Fencing Act, 1887** (50 & 51 Vict. c. 19), s. 3, "where any quarry dangerous to the public is in open or unenclosed land, within 50 yards of a highway or place of public resort dedicated to the public, and is not separated therefrom by a secure and sufficient fence, it shall be kept reasonably fenced for the prevention of accidents, and unless so kept shall be deemed to be a nuisance liable to be dealt with summarily in manner provided by the Public Health Act, 1875." And by the **Barbed Wire Act, 1893** (56 & 57 Vict. c. 32), s. 3 (1), "where there is on any land adjoining a highway within the county or district of a local authority a fence made with barbed wire, or in or on which barbed wire has been placed, and such barbed wire is a nuisance to such highway, it shall be lawful for such local authority to serve notice in writing upon the occupier of such land requiring him within a time therein stated (not to be less than one month nor more than six months after the date of the notice) to abate such nuisance"; and by sect. 3 (2), "if on the expiration of the time stated in the notice, the occupier shall have failed to comply therewith, it shall be lawful for the local authority to apply to a court of summary jurisdiction, and such court, if satisfied that the said barbed wire is

a nuisance to such highway, may, by summary order, direct the occupier to abate such nuisance; and on his failure to comply with such order within a reasonable time, the local authority may do whatever may be necessary in execution of the order, and recover in a summary manner the expenses in connection therewith."

2. **A licensee**, *i.e.*, a person to whom the owner of certain property has given consent to do certain acts which, without passing any interest in the property, merely prevents such acts from being wrongful, can **successfully maintain an action against his licensor, if the danger through which he sustained hurt was of a concealed character, which the licensor knew of and the licensee did not.** In the words of Willes, J., in *Gautret* v. *Egerton* (*y*), there must be something equivalent to laying a trap for the unwary licensee.

In *Southcote* v. *Stanley* (*z*), plaintiff, guest of defendant, was leaving defendant's house when a pane of glass fell from the door and cut him. Held, upon above grounds, defendant was not liable.

(*y*) (1867), L. R. 2 C. P. 371; and see *Corby* v. *Hill* (1858), 4 C. B. N. S. 556; *Hounsell* v. *Smyth* (1860), 7 C. B. N. S. 731; *Hardcastle* v. *S. Yorks. Ry. Co.* (1859), 4 H. & N. 67; *Gallagher* v. *Humphrey* (1862), 6 L. T. N. S. 684; *Ivay* v. *Hedges* (1882), 9 Q. B. D. 80; *Cooke* v. *Midland G. W. Ry. Co.* (1909) A. C. 229.

(*z*) (1856), 1 H. & N. 247; see also *Burchell* v. *Hickisson* (1881), 50 L. J. Q. B. 101.

3. Anyone who has entered upon premises on lawful business in which the person having the control of such premises has an interest, and who has sustained injuries in consequence of such premises not being kept in a reasonably secure condition, is entitled to maintain an action for damages against such person.

In *Indermaur* v. *Dames* (*a*), plaintiff, in the employ of a gasfitter, went by appointment with defendant to see that certain gas apparatus fixed by his employer on defendant's premises acted properly. While there plaintiff fell down an unfenced shaft and was injured. Held, on above ground, defendant was liable.

The same principle is illustrated in the cases of *Smith* v. *London and St. Katharine Docks Co.* (*b*) and *Heaven* v. *Pender* (*c*). In the former case the defendants, a dock company, provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers, and, while he

(*a*) (1866), L. R. 1 C. P. 274; and see *Harris* v. *Perry* (1903) 2 K. B. 219; *Wright* v. *Lefever* (1903), 51 W. R. 149. For the application of this principle to children attending elementary schools, see *Ching* v. *Surrey C. C.* (1910) 1 K. B. 736 (C. A.); *Morris* v. *Carnarvon C. C.* (1910) 1 K. B. 840 (C. A.).

(*b*) (1868), 3 C. P. 326.

(*c*) (1883), 11 Q. B. D. 503.

was on board, the defendants' servants, for the purposes of the business of the dock, moved the gangway, so that it was, to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, was returning along it to the shore, when the gangway gave way, and he was injured. Held, that there was a duty on the defendants towards the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received.

In *Heaven* v. *Pender* (*d*), plaintiff, a workman, was employed by A. to paint A.'s ship, lying in a dock. Defendant, the dock owner, provided staging for workmen's use. The staging not being strong enough, broke, and plaintiff was injured. Held, defendant was liable, on the ground that **persons having the control of buildings or other structures intended for human use and occupation are bound to keep them in a reasonably safe condition,** and are liable for injuries caused by neglect of such duty to **any person upon the spot, or engaged in work on or about the property whose condition is in question, in the course of any business in which the occupier has an interest.**

In *O'Neill* v. *Everest* (*e*) the two last-mentioned

(*d*) (1883), 11 Q. B. D. 503.

(*e*) (1892), 61 L. J. Q. B. 453; 66 L. T. 396. See also *Miller* v. *Hancock* (1893) 2 Q. B. 177 (C. A.); *Lane* v. *Cox* (1897) 1 Q. B.

cases were cited in the Court of Appeal on behalf of the plaintiff, but were distinguished on the ground that in both there was a concealed danger; in the one case the injury was caused by an insecure plank, in the other by a rotten rope. In the course of his judgment Lord Herschell, following the principle laid down in *Smith* v. *London and St. Katharine Docks Co.* (*f*), pointed out that, in order to succeed in an action of this kind, the plaintiff must prove a duty on the part of the defendant towards him to keep the premises in a reasonably secure condition, and, further, that the injury was the direct result of a breach by the defendant of such duty.

Persons sometimes have rights over the lands of others, entitling them to do acts which, if they had not such rights, would be trespasses. Of such rights the chief are easements and rights of common, a detailed exposition of which would be out of place in this work; but the following important points may be noticed:—

Rights of proprietors of land with regard to water flowing through or under their lands:

1. Natural streams running above ground, and

415; *Huggett* v. *Myers* (1908) 2 K. B. 278; *Lewis* v. *Ronald* (1909) 101 L. T. 534; *Williams* v. *Parsons* (1909) 26 T. L. R. 78 (C. A.); *Powell* v. *Thorndike* (1910) 26 T. L. R. 399 (C. A.).

(*f*) (1868), 3 C. P. 326. See also *White* v. *France* (1877), 46 L. J. Q. B. 823; *Marney* v. *Scott* (1899) 1 Q. B. 986.

subterranean streams the courses of which are well known and clearly defined.

Every riparian proprietor, *i.e.*, every person owning land adjoining a river, is deemed in law to own the soil up to the centre of the river, and if he interferes with it beyond that point he commits a trespass. Every proprietor of such adjoining land has, as a natural right incident to the right to the soil itself, a right to the reasonable use of the water; what is a reasonable quantity of water depending on the circumstances of each case (*g*). The above rule is, however, subject to the provision that the adjoining proprietor must not thereby interfere with the use of other proprietors either above or below him—*e.g.*, he must not foul the stream (*h*), though he may do so by grant or prescription (*i*). Every riparian proprietor has the right to have the water come to him in its natural state in flow, quantity and quality, and to go from him without obstruction (*k*).

This right cannot be granted to a non-riparian owner (*l*).

(*g*) *McCartney* v. *L. & L. S. Ry. Co.* (1904) A. C. 301; and see *Att.-Gen.* v. *G. N. Ry. Co.* (1908), 72 J. P. 442.

(*h*) *Wood* v. *Waud* (1849), 3 Ex. 748.

(*i*) *Embry* v. *Owen* (1851), 6 Ex. 353.

(*k*) See judgments in *Chasemore* v. *Richards* (1859), 7 H. L. C. 349; see also *Williams* v. *Morland* (1824), 2 B. & C. 910. As to natural streams increased by artificial means, see *Portsmouth W. W. Co.* v. *L. B. & S. C. Ry. Co.* (1910), 74 J. P. 61.

(*l*) *Ormerod* v. *Todmorden* (1883), 11 Q. B. D. 155.

The law as to a subterranean stream, the course of which is well known and clearly defined, as in the case of the river Mole, is the same as laid down above with regard to natural streams flowing above ground (*m*).

2. Artificial watercourses, as to which the law depends upon whether they are of a permanent or temporary character, and upon the circumstances under which they were created. If an artificial stream is permanent in its character, a right to the uninterrupted flow of the water may be acquired by prescription or grant against both the originator of the stream, and also against any person over whose land the water flows (*n*); but long enjoyment of an artificial stream will not give a right to the unobstructed use of a stream obviously made for temporary purposes, as to drain a mine (*o*).

In *Greatrex* v. *Hayward* (*p*), the plaintiff's land enjoyed for fifty years the benefit of artificial drains made by defendant, a neighbouring farmer, to drain his own lands. It was held that plaintiff could not prevent defendant from deepening the

(*m*) Per Pollock, B., in *Dudden* v. *Guardians of Clutton Union* (1857), 1 H. & N. 630; cf. *Mostyn* v. *Atherton* (1899) 2 Ch. 360.

(*n*) *Sutcliffe* v. *Booth* (1863), 32 L. J. Q. B. 136; *Holker* v. *Porritt* (1873), L. R. 10 Ex. 59; *Baily* v. *Clark* (1902) 1 Ch. 649.

(*o*) *Arkwright* v. *Gell* (1839), 5 M. & W. 203; *Wood* v. *Waud* (1849), 3 Ex. 748; *Burrows* v. *Lang* (1901) 2 Ch. 502.

(*p*) (1853), 8 Ex. 291.

drain for purposes of cultivation, and thereby depriving plaintiff of water enjoyed for fifty years, as the drain was originally made for temporary purposes.

"From the judgment in *Arkwright* v. *Gell* (*q*), it will be seen, that the reason why a right to the uninterrupted flow of the water of an artificial stream cannot be acquired by prescription against the originator of the stream, if it is of a temporary character, is, that the temporary nature of the stream precludes a presumption of a grant of a permanent right; but the case is manifestly different if the stream is permanent, although artificial, for there can be no reason why a person who makes a permanent watercourse may not make a grant of right in perpetuity to use the water to any person through whose land the stream is made to flow; and, indeed, nothing is more likely than that an owner of land would stipulate, when such a watercourse is made, that he shall have the benefit and use of the water as it flows through his land. A presumption of such a grant, therefore, may be readily made, and it will receive the sanction of the law" (*r*).

3. Natural streams running underground in undefined or unknown channels, and percolating water, the

(*q*) (1839), 5 M. & W. at p. 227.

(*r*) Goddard on Easements, 6th ed. p. 339; and see *Whitmore* v. *Stanfords* (1909) 1 Ch. 427.

course of which is underground, undefined and unknown.

There is no natural right to the uninterrupted flow of such streams (*s*), nor can such a right be acquired by prescription, for such a right, "founded upon length of enjoyment, is supposed to have originated in some grant; but what grant can be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment would be affected by any water percolating in and out of the defendant's or any other land? . . . . The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant, but how could a man prevent or stop the percolation of water?" (*t*). In *Chasemore* v. *Richards* (*u*), A.'s mill was worked by a river, supplied by water produced by the rainfall over a large district. B. sank a well on his own land, and pumped up water for the supply of Croydon, thereby preventing an enormous quantity of water from ever reaching the river or the mill. Held, A. had no

(*s*) *Acton* v. *Blundell* (1843), 12 M. & W. 324.

(*t*) Per Wightman, J., in delivering the opinion of the judges o the House of Lords in *Chasemore* v. *Richards* (1859), 7 H. L. C. at p. 370.

(*u*) (1859), 7 H. L. C. 349.

right of action against B. Such a right may, however, be acquired by express grant (*x*).

A landowner, therefore, may collect or dispose of such water, regardless of his neighbour's interests; but—

1. He may not foul it; for, though he may appropriate it, until appropriation there is no property in it; and whilst it percolates every owner through whose land it passes has a right to receive it in its natural condition.

   In *Ballard* v. *Tomlinson* (*y*), the plaintiff and defendant each possessed a well. The defendant turned sewage into his, whereby the plaintiff's became polluted. Held, by the Court of Appeal, unanimously reversing Pearson, J., in the Court below, that an action was maintainable.

2. He will be restrained from drawing off the subterranean water on the adjoining land, if in so doing he draws off water which has once flowed in a defined surface channel. "If you cannot get at the underground water without touching the water in a defined surface channel, you cannot get at it at all." Per Hatherley,

(*x*) *Whitehead* v. *Parks* (1858), 2 H. & N. 870.

(*y*) (1885), 29 Ch. D. 115. See also *Bradford Corporation* v. *Ferrand* (1902) 2 Ch. 655; cf. *Fergusson* v. *Malvern U. D. C.* (1909), 73 J. P. 361 (H. L.).

L.C., in *The Grand Junction Canal Co.* v. *Shugar* (*z*); thus distinguishing it from *Chasemore* v. *Richards* (*a*), where, likewise, the water in the river was diminished, but was diminished by preventing the subterranean water from ever reaching it, not (as in *The Grand Junction Canal Co.* v. *Shugar*) by drawing water away from the river itself.

Every person commits a tort who so uses his own land as to damage his neighbour by depriving him of the subjacent or adjacent support necessary to retain such neighbour's land in its natural and unencumbered state (*b*).

Notice carefully that this right to the support of the subjacent soil or of the adjacent land exists only **in favour of land unweighted by building**, *i.e.*, in favour of land in its natural state; and, further, that such an action will probably lie without proof of pecuniary loss, if actual subsidence is proved (*c*).

(*z*) (1871), L. R. 6 Ch. App. 488. See also *Jordeson* v. *Sutton* (1899) 2 Ch. 217 at p. 251.

(*a*) *Supra*, p. 84.

(*b*) *Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503; *Humphries* v. *Brogden* (1850), 12 Q. B. 739; *New Moss Colliery* v. *Manchester Corporation* (1908) A. C. 117.

(*c*) *Hamer* v. *Knowles* (1861), 6 H. & N. 454; *Attorney-General* v. *Conduit Colliery Co.* (1895) 1 Q. B. 301; and see *Butterly, &c., Co.* v. *New Hucknall, &c., Co.* (1909) 1 Ch. 37 (affirmed, H. L.

A person may, however, drain off water, even though it lets down his neighbour's land (*d*), but this right does not extend to water saturated with minerals or semi-fluid minerals (*e*).

But the right to support of land weighted by buildings may be acquired—

(1) By grant, which may be—

a. **Express**; or

b. **Implied**, *e.g.*, as in *Rigby* v. *Bennett* (*f*), where a man granted part of his land for building.

(2) By prescription (*g*).

The rule laid down in the famous case of *Angus* v. *Dalton* (*h*), is, that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, before the beginning of that time; and that it is so acquired if the enjoyment is peaceable and without deception or concealment,

(1910), 26 T. L. R. 415); *Lampson* v. *Staveley* (1908), 25 T. L. R. 136.

(*d*) *Popplewell* v. *Hodkinson* (1869), L. R. 4 Ex. 248.

(*e*) *Trinidad Asphalt Co.* v. *Ambard* (1899) A. C. 594.

(*f*) (1882), 21 Ch. D. 559.

(*g*) Prescription is only applicable to such rights as are capable of arising by virtue of a grant: *Chesterfield* v. *Harris* (1908) 2 Ch. 397.

(*h*) (1881), 6 App. Cas. 740. The rule also applies to docks and similar constructions: *Union Lighterage Co.* v. *London Graving Dock* (1902) 2 Ch. 557.

and so open that it must be known that some support is being enjoyed by the building.

In *Lemaitre* v. *Davis* (*i*), Hall, V.-C., held that the owner of buildings can acquire by prescription, as an easement within 2 & 3 Will. 4, c. 71, s. 2, a right to support from the buildings of the adjoining owner. But where buildings are not adjoining, no right of support can be so acquired. In *Solomon* v. *Vintners' Co.* (*k*), three contiguous houses in a street leaned out of the perpendicular for thirty years, A.'s leaning on B.'s, B.'s on C.'s. C. removed his, and the rest fell. In an action by A., it was held that he had no right to have his house supported by C.'s through the intervening house.

The right to support referred to in these different cases is quite independent of any question of negligence. A man is, of course, always responsible to his neighbour for carrying out works on his own land in a negligent and improper way (*l*).

"Waste is an unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement or otherwise to the injury of the inheritance" (*m*). Such injury may be loss of

(*i*) (1882), 19 Ch. D. 281.

(*k*) (1860), 4 H. & N. 585.

(*l*) See *Bower* v. *Peate* (1876), 1 Q. B. D. 321; and *Hughes* v. *Percival* (1883), 8 App. Cas. 443, *supra*, p. 42.

(*m*) Pollock, 8th ed. p. 352.

market value, or an alteration throwing doubt on the identification of the property, and thereby impairing the evidence of the title (*n*).

Voluntary waste is where the waste consists in the active doing of something, *e.g.*, pulling down a house, which alters the nature of the thing demised to the prejudice of the reversion (*o*).

Permissive waste is a mere passive act, *e.g.*, allowing a house to go to wrack and ruin, by reason of non-repair (*p*).

Legal waste is a term used to describe waste for which there lay a remedy *at law*,—**equitable waste**, waste which was only recognized as such and relieved against *in equity*. If an estate were given to a limited owner without impeachment for waste, at law he could commit what waste he chose, but equity would interfere to prevent his pulling down the mansion-house, or cutting ornamental timber; and these acts were called **equitable waste**. As regards the remedy in this case, the **Judicature Act, 1873** (36 & 37 Vict. c. 66), has abolished the distinction. By sect. 25 (3) of that Act, "an estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon

(*n*) Per Jessel, M.R., in *Jones* v. *Chappell* (1875), 20 Eq. 539; *Meux* v. *Cobley* (1892) 2 Ch. 253.

(*o*) *Jones* v. *Chappell*, *supra*; *West Ham C. C. Board* v. *E. London W. W. Co.* (1900) 1 Ch. 624.

(*p*) *Auworth* v. *Johnson* (1832), 5 C. & P. 239.

the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate."

The general rule is that tenants for life, for years, at will, and at sufferance, are liable for waste. This is, however, subject to the qualification that, in the absence of an express covenant or an obligation not to commit waste imposed by the instrument creating the estate (*q*), neither a tenant for life (*r*), nor a tenant at will (*s*), is liable for permissive waste (*t*).

A tenant in fee simple, of course, is not liable for waste; nor is a tenant in tail, because he can at any time bar the entail, and make himself tenant in fee simple; but a tenant in tail, after possibility of issue extinct, is liable for equitable waste, inasmuch as he cannot bar the entail.

(*q*) *Woodhouse* v. *Walker* (1880), 5 Q. B. D. 504.

(*r*) *Powys* v. *Blagrave* (1854), 4 De G. M. & G. 448; *Barnes* v. *Dowling* (1881), 44 L. T. N. S. 809; *In re Cartwright*, *Avis* v. *Newman* (1889), 41 Ch. D. 532; *In re Parry* (1900) 1 Ch. 160.

(*s*) *Gibson* v. *Wells* (1805), 1 B. & P. N. R. 290; 8 R. R. 801; *Harnett* v. *Maitland* (1847), 16 M. & W. 257; *Blackmore* v. *White* (1899) 1 Q. B. 293.

(*t*) On the other hand, in *Davies* v. *Davies* (1888), 38 Ch. D. 499, it was held by Kekewich, J., that a tenant for years *is* liable for permissive waste, but it may be respectfully doubted whether this decision would be upheld in a higher Court. See *Barnes* v. *Dowling*, *supra*; and the observations of Kay, J., in *In re Cartwright*, *Avis* v. *Newman* (1889), 41 Ch. D. at p. 535.

Nuisance is "the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or in some cases in the exercise of a common right" (*u*); it is either—

1. **Public**, *i.e.*, an act affecting the public at large, or some considerable portion of them. Remedy — indictment or information, or action for an injunction at the suit of the Attorney-General (*x*).
2. **Private**, *i.e.*, an act affecting some particular individual or individuals, as distinguished from the public at large. Remedy—action for damages or an injunction, or both; also abatement, *i.e.*, removal of the nuisance by the party injured, which removal must be (1) peaceable; (2) without danger to life or limb; and (3) (if it is necessary to enter another's land to abate the nuisance, or where the nuisance is a dwelling-house in actual occupation or on a common (*y*)) after notice, unless it is unsafe to wait. These three remedies are confined to private nuisances, but in one case they are applicable to public

(*u*) Pollock, 8th ed. p. 401.

(*x*) See, for example, *Attorney-General* v. *W. H. Smith & Son* (1910), 26 T. L. R. 482.

(*y*) *Perry* v. *Fitzhowe* (1845), 8 Q. B. 757; 15 L. J. Q. B. 239. See also *Lemmon* v. *Webb* (1895) A. C. 1.

nuisances, namely, where the act complained of more prejudicially and injuriously affects some particular individual or individuals than the public at large. In *Soltau* v. *De Held* (*z*), plaintiff resided in a house next to a Roman Catholic chapel, of which defendant was priest. The chapel bell was rung at all hours, day and night. Though the ringing was a public nuisance, it was held, on the above ground, that plaintiff was entitled to an injunction.

Nuisances are also—

1. **Those causing damage to property**, for which substantial compensation can always be obtained. In *St. Helen's Smelting Co.* v. *Tipping* (*a*), the fumes from the company's works killed the plaintiff's shrubs. Held, sufficient cause of action for nuisance against company.
2. **Those causing personal discomfort.** It is necessary to show material and continuous interference with "the physical comfort of human existence," according to an ordinary

(*z*) (1851), 2 Sim. N. S. 311; and see *Heath* v. *Brighton Corporation* (1908), 98 L. T. 718.

(*a*) (1865), 11 H. L. C. 650. See also *Smith* v. *Giddy* (1904) 2 K. B. 448; *West* v. *Bristol Tramways Co.* (1908) 2 K. B. 14; *Price* v. *London C. C.* (1908) 2 Ch. 526; and *Owen* v. *Faversham Corporation* (1909), 73 J. P. 33 (C. A.).

reasonable standard; thus it has been held that temporary annoyance caused by the execution of lawful works does not amount to a nuisance (*b*).

Where a nuisance is caused by the non-repair of premises, the occupier of such premises is *prima facie* liable (*c*); but the landlord is liable (1) if he has authorized the continuance of the nuisance (and it seems that merely letting the premises in a ruinous condition does *not* constitute such an authorization) (*d*), or (2) if by the terms of the lease he is bound to repair (*e*), but not otherwise (*f*). Where the occupier of land grants a licence to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant in an action to restrain the nuisance (*g*).

(*b*) *Harrison* v. *Southwark and Vauxhall Water Co.* (1891) 2 Ch. 409; *Polsue* v. *Rushmer* (1907) A. C. 121; *May* v. *Stoop* (1909), 25 T. L. R. 262 (crying children); *Robinson* v. *L. G. O. Co.* (1910), 26 T. L. R. 233 (motor bus); but see *Wing* v. *L. G. O. Co.* (1909) 2 K. B. 652.

(*c*) *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; but see *Palmer* v. *Bateman* (1908) 2 Ir. R. 393.

(*d*) *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401; *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658.

(*e*) *Todd* v. *Flight* (1860), 9 C. B. N. S. 377; *Broggi* v. *Robins* (1898), 14 Times L. R. 439.

(*f*) See *Pretty* v. *Bickmore*, and *Gwinnell* v. *Eamer*, *supra*; also *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311.

(*g*) *White* v. *Jameson* (1874), L. R. 18 Eq. 303; *Attorney-General* v. *Tod Heatley* (1897) 1 Ch. 560.

It is no defence to an indictment for nuisance to show that the act complained of is in some other way beneficial to the public. Thus, before tramways were authorized by statute, it was decided in *Reg.* v. *Train* (*h*) that to lay down a tramway in a public street, thereby obstructing the ordinary traffic, was an indictable nuisance at common law, though the number of persons using the tramcars, and so saving time and money, was much greater than the number of those who were obstructed.

It is no defence that plaintiff himself came to the nuisance (*i*), or that the trade or business causing annoyance is otherwise harmless, or even in itself necessary and praiseworthy. Thus, as was said in *Jones* v. *Powell* (*k*), "a tan house is necessary, for all men wear shoes; nevertheless it may be pulled down if it be erected to the nuisance of another. In like manner of a glass house; and they ought to be erected in places convenient for them."

Beware of the misleading phrase, "rights to light and air." Right to light is one thing; right to air is another. There is no such right known to the

(*h*) (1862), 2 B. & S. 640; cf. *Walton* v. *Vanguard Motor Bus Co.* (1909), 72 J. P. 505; *Gunter* v. *James* (1909), 72 J. P. 448.

(*i*) *St. Helen's Smelting Co.* v. *Tipping*, *supra*, p. 92; *Salvin* v. *N. Brancepeth Co.* (1873), L. R. 9 Ch. 705.

(*k*) (1628), Palm. at p. 539.

law as the specific right to the access of air over a neighbour's land. In *Webb* v. *Bird* (*l*) it was held that the owner of a windmill cannot, under sect. 2 of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill, though the mill has been worked by this air for over twenty years. In *Bryant* v. *Lefevre* (*m*), it was held that the access of air to chimneys cannot, as against the occupier of neighbouring land, be claimed (1) as a natural right of property, or (2) as an easement, by prescription from the time of legal memory, or (3) by a lost grant, or (4) under the Prescription Act, 1832.

An action, however, lies where the stoppage of air is injurious to health (*n*).

Right to light is not a natural right incident to the ownership of windows, but an easement, to which title must be shown—

1. By grant, express or implied, *e.g.*, where, as in *Palmer* v. *Fletcher* (*o*), a man grants a

(*l*) (1862), 13 C. B. N. S. 841 (Ex. Ch.); *Chastey* v. *Ackland* (1895) 2 Ch. 389; (1897) A. C. 165.

(*m*) (1879), 4 C. P. D. 172. See also *Harris* v. *De Pinna* (1886), 33 Ch. D. 238; *Bass* v. *Gregory* (1890), 25 Q. B. D. 481; *Cable* v. *Bryant* (1908) 1 Ch. 259; *Jones* v. *Pritchard*, (1908) 1 Ch. 630.

(*n*) *City of London Brewery Co.* v. *Tennant* (1873), L. R. 9 Ch. 221.

(*o*) (1664), 1 Sid. 167, 207.

house in which there are windows, neither he nor anyone claiming under him can stop up the windows or destroy the lights; or

2. By prescription at common law; or

3. By prescription under the Prescription Act (2 & 3 Will. 4, c. 71), s. 3, by which twenty years' use, unless by written consent, gives the right (*p*). By sect. 4, nothing is to be deemed an interruption unless submitted to for a year after notice. Therefore, in *Flight* v. *Thomas* (*q*), where there had been an enjoyment for nineteen years and 330 days, followed by an interruption of thirty-five days just before action, it was held that such an enjoyment was sufficient to establish the right.

An owner of ancient lights can restrain any substantial interference with the light enjoyed previously to the interruption sought to be restrained, and his rights are not limited merely to sufficient light for his present business. In *Yates* v. *Jack* (*r*), a merchant's warehouse had its lights blocked by a building opposite, and the defendant's plea, that

(*p*) The section applies to adjoining tenements held by different tenants from the same landlord: *Fear* v. *Morgan* (1907) A. C. 425; *Hyman* v. *van den Bergh* (1908) 1 Ch. 167.

(*q*) (1840), 11 A. & E. 688.

(*r*) (1866), L. R. 1 Ch. 295.

enough light was still left for his business purposes, was held bad.

On the other hand, in order to succeed in an action for the obstruction of ancient lights, it is not sufficient for the plaintiff to prove merely that the light is less than before. After much uncertainty it is now settled that he must prove that the diminution of light is such as really makes the dominant tenement to a sensible degree less fit for the ordinary purposes of business or occupation (*s*) —that is, he must prove a nuisance.

A right to a special amount of light necessary for a particular business cannot be acquired by prescription (*t*).

Where the owner of the dominant tenement so alters his buildings as to increase the burden on the servient tenement, it is impossible to sever the burden and say he is still entitled to impose on the servient tenement the burden which had previously existed; in other words, by so altering his buildings he loses his right of light (*u*).

If a person opens new lights, these may be obstructed with impunity; but an existing right to light is not lost by interruption which is not

(*s*) *Back* v. *Stacey* (1826), 2 C. & P. 465; *Colls* v. *Home and Colonial Stores* (1904) A. C. 179; *Jolly* v. *Kine* (1907) A. C. 1; *Higgins* v. *Betts* (1905) 2 Ch. 210.

(*t*) *Ambler* v. *Gordon* (1905) 1 K. B. 417.

(*u*) *Ankerson* v. *Connelly* (1906) 2 Ch. 844 (C. A.).

continuous in time and quantity (*x*), or by a subsequent intermission of enjoyment not amounting to intentional abandonment, or by enlarging, rebuilding, or altering the window for which access of light is claimed (*y*), so long as the ancient lights, or a material part thereof, remain substantially capable of continuous enjoyment. It is not necessary that the structural identity of the old windows be preserved (*e.g.*, a house may be pulled down and rebuilt (*z*)), but the plaintiff must give evidence as to the position of the ancient lights (*a*).

B. Of Wrongs to Personal Property.

Trespass to goods is the wrongful meddling by a person with the goods of another, either by removing them, or by otherwise dealing with them.

Conversion is the removal of goods from the possession of another with the design of depriving that other of them, or of exercising some dominion or control over them for his own benefit, or the benefit of some third person.

(*x*) *Presland* v. *Bingham* (1889), 41 Ch. D. 268.

(*y*) *Tapling* v. *Jones* (1865), 11 H. L. C. 290; *Ecclesiastical Commissioners* v. *Kino* (1880), 14 Ch. D. 213; *Greenwood* v. *Hornsey* (1886), 33 Ch. D. 471.

(*z*) *Scott* v. *Pape* (1886), 31 Ch. D. 554.

(*a*) *Fowlers* v. *Walker* (1882), 51 L. J. Ch. 443.

It is important to notice the fundamental distinction between these two wrongs. Trespass is essentially a wrong to the actual possessor, and therefore cannot be committed by a person in possession (*b*); conversion, on the other hand, is a wrong to the person entitled to immediate possession. The actual possessor is frequently, but not always, the person entitled to immediate possession, so that conversion may, but does not necessarily, include trespass.

An action for trespass lies against A. by B. when A. takes goods from the possession of B. This is so, even though B. is not the true owner; provided B.'s possession is (1) either actual or constructive (*c*), and (2) rightful as regards A. In other words, bare possession is generally a sufficient title as against a wrongdoer (*d*). In *Armory* v. *Delamirie* (*e*), a chimney-sweep found a jewel. He inquired its value of a jeweller, who, under a pretence of weighing it, took out the stone and then offered him three halfpence for it, and on the offer being declined refused

(*b*) *Johnson* v. *Diprose* (1893) 1 Q. B. 512.

(*c*) See p. 68, *supra*.

(*d*) *The Winkfield* (1902) P. 42, 54, 55 (C. A.); *Glenwood Lumber Co.* v. *Phillips* (1904) A. C. 405.

(*e*) (1722), 1 Sm. L. C. 11th ed. 356. See also *Bridges* v. *Hawkesworth* (1851), 21 L. J. Q. B. 75; and *South Staffordshire Water Co.* v. *Sharman* (1896) 2 Q. B. 44, and the discussion of these cases in Clerk and Lindsell on Torts (1909), 5th ed. pp. 11, 269, 275.

to give it up. Held (1) the finder has a property against all but the true owner; (2) on non-production, the jewels must be considered to be of the finest water, for *omnia præsumuntur contra spoliatorem*.

In the case of conversion, "the grievance is, the unauthorized assumption of the powers of the true owner" (*f*). It is conversion none the less, though the wrongdoer only deals with the goods as owner for a very short time, and for a very limited purpose. It is no excuse that the defendant was acting under a mistaken, although an honest, and even reasonable, supposition of being lawfully entitled. Refusal to deliver on demand is evidence, but evidence only, of conversion, as there are cases (*e.g.*, the case of a servant in possession) where delay is justifiable.

Is a person liable for conversion if he *bonâ fide* deals with goods at the request of the apparent owner? He is not liable if he deals with (*contrà*, if he assumes to dispose of) goods as the servant or agent of an apparent owner in actual possession (or under a contract with such apparent owner) according to the apparent owner's direction; provided (1) the act done (or the contract) does not purport to involve a transfer of the supposed property in the goods, and (2) the ostensible owner's direction is one which he could lawfully give if he were the

(*f*) Pollock, 8th ed. p. 357.

true owner, and (3) which is obeyed in the honest belief that he is (*g*). See *Hollins* v. *Fowler* (*h*) (especially Lord Blackburn's observations (*i*)), where the defendants were held liable in conversion, because they exercised a real and effective, though transitory, dominion—they assumed to dispose of the goods. Applying the above rule, if A. steals corn, and takes it to a miller to be ground and returned to him, the miller is not liable in conversion; but if A. tells his servant B. to sell the stolen corn to C., and B. does so, B. is liable in conversion, even though he believes that the corn belongs to his master, A. This principle has been recently applied so as to render an auctioneer liable for selling goods in the ordinary course of his business, although he had no notice of the apparent owner's want of title (*k*).

If a bailee who has an interest, but a special and limited one, in the goods the subject of the bailment (*e.g.*, in case of hire or pledge), under cover of such interest deals with the goods in excess of his rights, he is only liable in conversion if his acts are wholly inconsistent with the contract

(*g*) Pollock, 8th ed. pp. 360–363.

(*h*) (1875), L. R. 7 H. L. 757; cf. *New York Breweries* v. *Attorney-General* (1899) A. C. 62, at p. 70.

(*i*) *Ibid.* pp. 768–781.

(*k*) *Consolidated Co.* v. *Curtis* (1892) 1 Q. B. 495. As to a pawnbroker, see *Singer* v. *Clark* (1879), 5 Ex. D. 37.

under which he had the limited interest, as, *e.g.*, if a hirer sells or destroys the goods hired (*l*).

The general rule is, that **no one can acquire a title to a chattel personal from a person who has himself no title to it**; but this has no application to—

1. **A person who bonâ fide, and for valuable consideration, receives a negotiable instrument**—*e.g.*, a bill of exchange or a promissory note—such person being entitled to recover upon it, even though it has been stolen or fraudulently obtained by the person from whom he received it.

   In *Miller* v. *Race* (*m*), plaintiff was a *bonâ fide* holder for valuable consideration of a note stolen from a mail-bag by highway robbers. On presentation, the bank clerk refused to cash, or even to return, it. Held, plaintiff was entitled to recover on the note.

   If the instrument is not negotiable, *e.g.*, payable to order, and not indorsed, the thief or finder cannot pass any title to it by forging the indorsement, except, indeed, as against himself (*n*); nor in the case of a cheque

(*l*) *Cooper* v. *Willomatt* (1845), 1 C. B. 672; 14 L. J. C. P. 219.

(*m*) (1758), 1 Burr. 452; but see *Smith* v. *Prosser* (1907) 2 K. B. 735.

(*n*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24.

crossed "not negotiable" can a person pass any better title than he has himself (*o*).

The rule as to negotiable instruments includes current coin of the realm, but does not apply to a coin which has only been kept as a curiosity (*p*).

2. **Sale in market overt, provided that the purchaser buys the goods in good faith and without notice of any defect or want of title on the part of the seller—by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22.**

If, however, the goods have been stolen and the thief is prosecuted to conviction, the property in the goods revests in the original owner:—

(1) On conviction, if in the opinion of the Court before whom the conviction takes place the title to the goods is not in dispute and such Court direct restitution and that the property shall revest at once.

(2) On the expiration of ten days after the conviction if the Court has not given the direction mentioned in (1) above and if there is no appeal.

(3) On dismissal of an appeal against the conviction, unless the Court of

(*o*) *Ibid.* sect. 81.
(*p*) *Moss* v. *Hancock* (1899) 2 Q B. 111.

Criminal Appeal annuls or varies an order for restitution made by the Court before whom the conviction took place, in which case the order, if annulled, does not take effect, or, if varied, takes effect as varied (*q*).

Sale in market overt is sale in open market, as opposed to sale in private, and means—(1) **in the City of London**, sale in an open shop of goods usually sold in such shop (*r*); (2) **in the country and elsewhere**, sale in the market-place, or on the piece of ground customarily used for the sale of goods.

Where the seller of goods has obtained them in such a way that he has no title at all, the *bonâ fide* purchaser can acquire no title to them except by buying them in market overt, and even in that case, if the goods have been stolen, and the thief is prosecuted to conviction, the *bonâ fide* purchaser will lose his title against the original owner on the occurrence of the events mentioned in (1), (2) or (3) on the preceding page (*s*). If, however, the seller at the time of selling the goods, had a title which was voidable, but which had not then been avoided,

(*q*) Sale of Goods Act, 1893, s. 24; Criminal Appeal Act, 1907, s. 6. The latter Act makes no other alteration. Consequently, no appeal lies to the Court of Criminal Appeal from such an order alone: *Rex* v. *Elliott* (1908) 2 K. B. 452.

(*r*) *Hargreave* v. *Spink & Son* (1892) 1 Q. B. 25.

(*s*) Sale of Goods Act, 1893, ss. 22, 23, 24, and Criminal Appeal Act, 1907, s. 6.

e.g., if he had obtained them by means of a contract induced by fraud, the *bonâ fide* purchaser acquires a good title to the goods of which he cannot in any way be divested (*t*).

Where horses are stolen, and are then sold in market overt to a *bonâ fide* purchaser for value, even then the property does not pass, unless certain formalities required by statutes of Mary and Elizabeth (*u*) are complied with, viz.:—

(1) The horse must be exposed in open market for one hour between 10 a.m. and sunset;

(2) A minute description of buyer, seller, horse and terms of contract, must be entered in the book-keeper's book;

and even then, if the horse has been *stolen*, the rightful owner can recover it within six months of the sale by tendering to the person possessed of it the price paid by such person.

No writ of execution against goods affects the title to such goods acquired by any person *bonâ fide* and for valuable consideration before actual seizure under such writ; provided that the purchaser had not, at the time when he acquired the title, notice that such writ had been issued (*v*).

(*t*) Sale of Goods Act, 1893, s. 23.

(*u*) 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12.

(*v*) Sale of Goods Act, 1893, s. 26. Compare *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, with *King's Norton Metal Co.* v. *Edridge* (1897), 14 T. L. R. 98. See also *Gordon* v. *Street* (1899) 2 Q. B. 641.

Recaption is the retaking by a lawful owner of goods of which he has been wrongfully deprived. He may retake them wherever he may find them, provided he does not do so riotously, or by committing a breach of the peace.

In Trespass or Conversion who is entitled to sue? Generally the person possessed of the goods at the time of the wrongdoing; but in bailment, the bailor may sue for an injury of a permanent nature (*e.g.*, if goods are destroyed or permanently damaged), and the bailee may sue for the direct loss to him.

Remedies:—

1. **Formerly, for direct trespass** there lay the action of **trespass** for **damages** for the direct injury done; and **for injury indirectly resulting from the trespass** there lay the so-called action of **trespass on the case.**

   Now, the proper remedy for trespass to goods is an action for damages.

2. **Formerly, for conversion** there lay the action of **trover** (based on the assumption, generally a fiction, that defendant had found the goods in question) **for the value (not for the return) of the goods.**

   Now, for conversion an action lies for the value of the goods.

3. **Formerly, for wrongful detention of goods** there lay the action of **detinue**, which was an

action for damages for wrongful detention *or* for the return of the goods. Defendant, on an adverse verdict, could return the goods or pay their value; but by the **Common Law Procedure Act, 1854**, plaintiff might apply to the Court to order the return of the goods, without giving defendant the option of retaining them on payment of their value.

Although the distinction between forms of action was abolished by the Judicature Acts, yet the following causes of action still exist:—

Trespass to recover damages for interference with goods,

Trover to recover the value of goods for wrongful conversion thereof,

Detinue to obtain the return of goods wrongfully detained, with or without damages for their detention.

Action of replevin. The owner of goods unlawfully distrained, seized under colour of distress or otherwise, can obtain the replevying—*i.e.*, the return of such goods—on giving security to the registrar of the district County Court to prosecute an action of replevin against the seizor without delay, and to return the goods if a return should be adjudged. The action must be commenced within one month in the district County Court (*x*), or

(*x*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 136.

within one week in the High Court. In the latter case, unless judgment be obtained by default, the plaintiff must prove that he had good ground for believing either that the title to some hereditament, the yearly rent or value whereof exceeded 20*l.*, or to some toll, market, fair, or franchise was in question, or that the rent or damage subject of the distress, or the value of the goods seized, exceeded 20*l.* (*y*).

A patent (*z*) is a privilege given by the Crown to the true and first inventor within the realm of any new manufacture of general utility for fourteen years or less, to make and vend it exclusively, on condition of filing a specification—*i.e.*, a complete description of the invention, so that any ordinary skilful person can use it at the end of the term.

It is sufficient that the invention be new within the realm, so that no objection can be made that it was already known abroad or in the Colonies (*a*).

The invention of a new process or product, or of an improvement on an existing invention, may be patented, but not where it is the discovery of a principle or natural law (*b*). A certain amount of ingenuity and utility is also essential.

(*y*) *Ibid.* s. 135.

(*z*) The main statute is the Patents and Designs Act, 1907 (7 Edw. 7, c. 29), as amended slightly by 8 Edw. 7, c. 4.

(*a*) *Rolls* v. *Isaacs* (1881), 19 Ch. D. 268.

(*b*) *Patterson* v. *Gas Light & Coke Co.* (1876), 2 Ch. D. 812; cf. *Dover* v. *Bernstein* (1910), 54 S. J. 250.

The specification may be provisional or complete. A provisional specification is, however, required to be followed by a complete specification within six months of the application. It can be amended by leave of the Court (*c*). If the specification is fraudulent, it will be void (*d*).

When an application has been received it is examined and on the examiner's report the Comptroller-General may accept or refuse to accept or require amendment. An appeal lies from him to the Attorney-General. If the application has been accepted it is advertised and then any one may oppose the grant within two months afterwards. If there is no opposition, or it is overruled, the patent is sealed and dates from the day of the application. The applicant can make use of his invention between the acceptance and sealing without prejudicing his application for a patent.

The patentee may either use his rights himself or assign them or grant licences. If a licensee exceeds the terms of his licence he will be liable for an infringement (*e*). A licensee cannot sue for infringement (*f*). In certain cases, the Court will compel him to grant licences.

(*c*) *In re Geipel* (1903) 2 Ch. 715 ; *In re Klaber* (1908) 1 Ch. 847.
(*d*) *Re Ralston's Patent* (1909), 100 L. T. 386.
(*e*) *Roger* v. *Cochrane* (1909) A. C. 285 ; but see *Gillette* v. *Gamage* (1909), 25 T. L. R. 808.
(*f*) See *Neilson* v. *Horniman* (1910), 26 T. L. R. 188.

Where the Court deems the patentee inadequately remunerated by his patent, it may, upon petition and his compliance with certain conditions, extend his patent for another seven, or in exceptional cases fourteen, years (*g*).

A patent may be revoked after grant either on petition or by way of counterclaim to an action for infringement. One ground is that the article is wholly or mainly manufactured abroad (*h*). Within two years of the grant, the petition may be addressed to the Comptroller-General instead of to the Court.

If any person infringes the patent he will be liable to an action for damages and an injunction (*i*). Although the Crown is bound by the patent laws, yet provision is made for the use of inventions by Government departments on exceptional terms.

If a person wrongly claims a patent and threatens legal proceedings against anyone for infringement,

(*g*) *In re Johnson* (1908) 2 Ch. 487 ; *In re Johnson* (No. 2) (1909) 1 Ch. 114 ; *In re Thompson* (1909) 2 Ch. 447.

(*h*) Patents and Designs Act, 1907, s. 27 ; *In re Hatschek* (1909) 1 Ch. 76 ; *In re Bremer* (1909) 2 Ch. 217.

(*i*) The mere purchase of machinery, which contravenes a patent, with the intention of using it, constitutes an infringement, whether it is in fact used or not : *British United Shoe Co.* v. *Collier* (1909) 25 T. L. R. 415 (C. A.) (affirmed H. L. (1910) 26 T. L. R. 587) ; and see Patents and Designs Act, 1907, s. 33.

the latter can obtain an injunction to restrain him from so doing (*j*).

Copyright is the sole and exclusive right of multiplying copies of an original work or composition which exists in its author, or his assigns, for the **author's natural life, and seven years from his death,** *or* **forty-two years,** whichever period is longer (5 & 6 Vict. c. 45, s. 3) (*k*). Copyright of an article written for an encyclopædia, and paid for by the proprietor, is in him, but **after twenty-eight years** reverts to the author, or his representatives. Right to property in copyright **must be registered at Stationers' Hall,** and is **assignable by entry of transfer there.** If, however, the author omits to register, his copyright is unaffected, but he cannot sue for an infringement until he has registered.

No copyright exists in immoral or libellous works.

This statutory copyright must be distinguished from the common law right a person has to prevent the publication of any of his writings (*l*).

By statute also, copyright for various periods may be acquired in paintings, engravings, sculpture and designs. Provision is also made for securing to the

(*j*) Patents and Designs Act, 1907, s. 36 ; and see *Craig* v. *Dowding* (1908), 98 L. T. 231.

(*k*) An innocent infringer is liable in damages : *Mansell* v. *Valley Printing Co.* (1908) 2 Ch. 441.

(*l*) See *Pope* v. *Curl* (1741), 2 Atk. 342 ; *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652 ; *Macmillan* v. *Dent* (1907) 1 Ch. 107 ; and *Philip* v. *Pennell* (1907) 1 Ch. 577.

author rights of dramatic and musical representation (*m*). Copyright in lectures is secured by 5 & 6 Will. 4, c. 65, but the statute does not supersede the common law right mentioned above (*n*).

A trade mark is a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof used or intended to be used upon or in connection with goods in order to indicate that they are the goods which the proprietor of the trade mark has manufactured, selected, certified, dealt with, or offered for sale (*o*).

A trade mark must contain or consist of at least one of the following essentials :—

(1) The name of a company, individual or firm indicated in a special or particular manner;

(2) The signature of the proprietor or of some predecessor in his business;

(3) An invented word or invented words (*p*);

(4) A word or words having no direct reference to the character or quality of the goods (*q*) and not being a geographical name or surname (*r*);

(*m*) A perforated roll by which a machine can produce musical sounds is not a musical work: *Mabe* v. *Connor* (1909) 1 K. B. 215.

(*n*) *Caird* v. *Sime* (1887), 12 App. Cas. 326.

(*o*) *Major* v. *Franklin* (1908) 1 K. B. 712.

(*p*) *In re Magnolia Metal Co.* (1897) 2 Ch. 497; *In re Gestetner* (1908) 1 Ch. 513; *Re Leopold Casella* (1910), 26 T. L. R. 472.

(*q*) Such as "perfection": *In re Crossfield* (1910) 1 Ch. 130.

(*r*) But see *In re California* (1910) 1 Ch. 130.

(5) Any other distinctive mark (*s*).

A trade mark must be registered, and provision is made for opposition to any application, and correction and rectification of the register. The registration must be renewed every fourteen years. A trade mark can only be assigned in connection with the business in respect of which it is used (*t*). And only the owner can sue for an infringement (*u*).

The same trade mark can be registered by different persons for different classes of goods, but not for the same classes, except what are known as pre-1875 marks (*x*). A series of trade marks, *i.e.*, trade marks resembling one another in material particulars but with minor differences, may be registered together.

Registration is *primâ facie* evidence of the validity of a trade mark for seven years and afterwards is conclusive evidence except in the case of fraud or where it is likely to deceive the public (*y*).

Where the infringement is innocent the only remedy is an injunction, not damages (*z*).

The property in a trade mark is the exclusive

(*s*) A design, which is capable of registration as such under the Patents and Designs Act, can nevertheless be registered as a trade mark: *Re U. S. Playing Card Co.* (1908) 1 Ch. 197.

(*t*) *Lecouturier* v. *Rey* (1910) A. C. 262.

(*u*) *Ullmann* v. *Leura* (1908) A. C. 443.

(*x*) *Re Gutta Percha, &c., Co.* (1909) 2 Ch. 10.

(*y*) Cf. *Re McGlennon* (1908) 25 T. L. R. 23; *Re Royal Worcester, &c., Co.* (1909) 1 Ch. 459.

(*z*) *Slazenger* v. *Spalding* (1910) 1 Ch. 257.

right to the use of the mark in respect of a particular class of goods, and consequently does not include the right to restrain the use of the same mark in respect of a different class of goods.

The Trade Marks Act, 1905, now governs this subject (*a*).

Trade Marks should be distinguished from **Trade Names.** Where a manufacturer makes an article and sells it under a certain name so that it comes in the trade to mean the article made by him and nothing else, no trader is entitled to use that name in connection with his goods so as to be likely to deceive purchasers (either from him or from persons to whom he sells his goods) (*b*). It is not necessary to prove an actual intent to deceive (*c*), and, probably, not even actual damage (*d*). The name may be a surname. A person who does not bear that name (*e*), and even one who does bear it (*f*), will be restrained from using it unless he clearly

(*a*) 5 Edw. 7, c. 15.

(*b*) *Reddaway* v. *Banham* (1896) A. C. 199; *Burberry's* v. *Cording* (1909) 25 T. L. R. 576.

(*c*) *Saxlehner* v. *Apollinaris Co.* (1897) 1 Ch. 893.

(*d*) *Warwick* v. *New Motor Co.* (1910) 1 Ch. 248.

(*e*) *Valentine* v. *Valentine* (1900), 83 L. T. 259. As to companies, see *Standard Bank of South Africa* v. *Standard Bank* (1909) 25 T. L. R. 420; *Scottish Union, &c., Insce. Co.* v. *Scottish National Insce. Co.* (1909) S. C. 318; *Elliott* v. *Expansion of Trade* (1909), 54 S. J. 101. There is no right to the name of a book: *Dicks* v. *Yates* (1881), 18 Ch. D. 76; *Crotch* v. *Arnold* (1909), 54 S. J. 49.

(*f*) *Cash* v. *Cash* (1902), 86 L. T. 211.

distinguishes it so as to avoid all chance of deceit (*f*). In the absence of express agreement, an ex-employee cannot be prevented from advertising the fact that he was so employed (*g*).

In certain cases, a person will be restrained from using a business qualification to which he has no right (*h*).

The rule applies even where no name is attached, but the public have come to know a particular manufacturer's goods by their special "get up" provided it is quite distinctive (*i*).

(*f*) *Cash* v. *Cash* (1902), 86 L. T. 211.

(*g*) *Cundey* v. *Lerwill* (1908), 99 L. T. 273.

(*h*) *Society of Accountants* v. *Goodway* (1907) 1 Ch. 489 ; but see *Society of Architects* v. *Kendrick* (1910), 26 T. L. R. 433.

(*i*) *Birmingham Vinegar Co.* v. *Powell* (1897) A. C. 715 ; *Edge* v. *Niccolls* (1910), 26 T. L. R. 588.

CHAPTER VI.

OF LOSS OF SERVICE, SEDUCTION, CONSPIRACY, MAINTENANCE, AND CHAMPERTY.

Loss of Service.—Every person who knowingly and designedly interrupts the relation subsisting between master and servant (1) by procuring the servant to depart from the master's service, or (2) by harbouring and keeping him as servant after he has quitted his place and during the stipulated period of service, whereby his master is injured, commits a wrongful act, for which he is responsible in damages (*a*). In *Lumley* v. *Gye* (*b*), the plaintiff, the manager of a theatre, sued defendant, a rival manager, for inducing a third party to break an engagement to sing at plaintiff's theatre. Held, plaintiff entitled to recover.

Prior to *Lumley* v. *Gye*, it used to be thought:—(1) as Coleridge, J., held, in his dissenting judgment, that such an action only lay where the strict relationship of master and servant was proved.

(*a*) See judgment of Crompton, J., in *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L. J. Q. B. 463; *Evans* v. *Walton* (1867), L. R. 2 C. P. 615.

(*b*) (1853), 2 E. & B. 216.

(*Bowen* v. *Hall* (*c*) confirmed *Lumley* v. *Gye*, Lord Coleridge, C.J., dissenting on the same grounds as Coleridge, J., had done before him.) (2) That the damage sued for must have been the legal consequence of defendant's act (*d*). Thus, if A. slander B. to a mob, who, in consequence, throw B. into a horse-pond, according to this view B. could not recover for such damage as against A. But *Lumley* v. *Gye* altered this rule, and allowed the wrongful act of a third party to form part of the damage, if such act would naturally arise from defendant's conduct.

Action of Seduction.—This action is a variety of the last-mentioned action, but in its modern development the service on the loss of which the action is based is a fiction (*e*). The proper person to sue is the master of the girl seduced and the cause of action is the loss of the benefit of her services by the defendant's wrongful act. He need not prove an express contract of service, nor need he prove that the defendant was aware of the service. If the plaintiff is the father and the girl is under age and not in actual service with another, service is presumed.

"It is sufficient that the daughter was living

(*c*) (1881), 6 Q. B. D. 333 ; approved and followed in the recent case of *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1905) A. C. 239.

(*d*) See *Vicars* v. *Wilcocks* (1806), 8 East, 1 ; 9 R. R. 361.

(*e*) See *Postlethwaite* v. *Parkes* (1766), 3 Burr. 1878.

with her father, forming part of his family and liable to his control and command." "The right to the service is sufficient" (*f*).

Thus, it has been held that, where a girl had been dismissed from her employment, she was in her father's service while on her way home and before she reached home (*g*).

If the plaintiff is not the father, or his child is not under age, provided she be living under plaintiff's roof as one of the family, service will be presumed from slight acts of household duty, *e.g.*, milking cows or making tea (*h*).

On the other hand, if the girl was in the service of a third party or of the defendant, the mere fact that she occasionally assisted in home duties does not create the relation of master and servant between her father and herself so as to entitle the father to maintain an action, for, as Kelly, C.B., said in *Hedges* v. *Tagg* (*i*), "It has been truly said that the action of seduction is founded on a fiction; but for that fiction, there must be some foundation, however slender in fact."

(*f*) Per Littledale, J., in *Maunder* v. *Venn* (1829), Moo. & M. 323; 31 R. R. 734.

(*g*) *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599.

(*h*) Per Butler, J., in *Bennett* v. *Alcott* (1787), 2 T. R. at p. 168.

(*i*) (1872), L. R. 7 Ex. at p. 205, cited with approval by Vaughan Williams, L.J., in *Whitbourne* v. *Williams* (1901) 2 K. B. at pp. 724, 725.

The relationship of master and servant must have existed—

1. At the time of seduction; and
2. At the time of illness and loss of service.

In *Davies* v. *Williams* (*k*), where a girl was seduced while in the service of one master, and became ill during her service with another, it was held that the seducer was not liable. Similarly where the girl was living with her father when seduced, and he died before her illness, at which time she was living with her mother, it was held that no action lay (*l*).

If plaintiff has encouraged profligate persons, or otherwise caused his own injury, he has no ground of action (*m*).

The damages are exemplary or vindictive, *i.e.*, not merely for the actual damage sustained, but for the anxiety, distress, loss of society and comfort suffered by the plaintiff, and for the dishonour brought upon him (*n*). If, however, the master, not parent, sues, the measure of damages is the actual loss (*o*).

Though no action for seduction lies against a master for seducing his servant, yet this exemption

(*k*) (1848), 10 Q. B. 725.
(*l*) *Hamilton* v. *Long* (1905) 2 Ir. R. 552.
(*m*) *Reddie* v. *Scoolt* (1794), 1 Peake, 316.
(*n*) Per Lord Eldon, in *Bedford* v. *McKowl* (1800), 3 Esp. at p. 120.
(*o*) *McKenzie* v. *Hardinge* (1906), 23 T. L. R. 65.

will not cover the case of mere colourable hiring for the express purpose of seduction (*p*).

Conspiracy.—In recent years there have been very important decisions of the House of Lords (*q*) and the Court of Appeal (*r*) on the law of conspiracy, which have been followed by the Trade Disputes Act, 1906 (*s*). The following propositions appear to be deducible therefrom (*t*) :—

1. An act which is in itself lawful cannot be converted into an unlawful act so as to render the doer of the act liable to a civil action merely because it is done with a bad motive (*u*).

2. If without legal excuse A. induces B. to break a contract with C. whereby C. suffers damage, A. is liable to C.; or if A. by means of intimidation or

(*p*) *Speight* v. *Oliviera* (1819), 2 Stark. 493 ; 20 R. R. 728.

(*q*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1892) A. C. 25 ; *Allen* v. *Flood* (1898) A. C. 1 ; *Quinn* v. *Leathem* (1901) A. C. 495 ; *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1905) A. C. 239.

(*r*) *Temperton* v. *Russell and others* (1893) 1 Q. B. 715 ; *Giblan* v. *National Labourers' Union* (1903) 2 K. B. 600.

(*s*) 6 Edw. 7, c. 47. This Act has been followed by statutory provisions designed to settle disputes between employers and workmen in certain trades by special procedure. See the Trade Boards Act, 1909 (9 Edw. 7, c. 22).

(*t*) For the first four of these propositions I am mainly indebted to the interesting article by Mr. A. V. Dicey, K.C., on this difficult subject in the Law Quarterly Review, vol. xviii. pp. 1–6.

(*u*) *Allen* v. *Flood*, *supra* ; per Lord Macnaghten in *Quinn* v. *Leathem* (1901) A. C. at pp. 508, 509 ; and *Read* v. *Friendly Society of Operative Stonemasons* (1902) 2 K. B. 732 (C. A.).

coercion compels B. to cease dealing with C. or to leave C.'s employment and C. is thereby damaged, A. is liable to C., even though B. has not broken any contract with C. (*x*). It is no legal excuse for A. to show that he had no malice against C., and that he induced B. to break his contract with C. *bonâ fide* in the supposed interests of B. (*y*).

3. Acts which are done by A. and B., who are acting in concert, solely with the lawful object of preserving and developing their trade and increasing their profits, and which do not necessitate the employment of any means in themselves unlawful, are not actionable even though these acts cause damage to C. (*z*).

4. A combination of A. and B. to damage C. in his trade, and by means of coercion or intimidation to induce C.'s customers or servants against their will to break their contracts with him or not to deal with him, or not to continue in his employment,

(*x*) *Lumley* v. *Gye*, *Bowen* v. *Hall*, *Temperton* v. *Russell*, *Quinn* v. *Leathem*, *Giblan* v. *National Labourers' Union South Wales Miners' Federation* v. *Glamorgan Coal Co.*, *supra*; *José* v. *Metallic Roofing Co.* (1908) A. C. 514.

(*y*) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, *supra*; *National Phonograph Co.* v. *Edison Bell Co.* (1908) 1 Ch. 335.

(*z*) Per Bowen, L.J., in *Mogul Steamship Co.* v. *McGregor*, *Gow & Co.* (1889), 23 Q. B. D. at pp. 613, 614, Lord Watson, in S. C. (1892) A. C. at pp. 40–44, and Lord Hannen, *ibid.*, at p. 59.

was settled by *Quinn* v. *Leathem* (*a*) to be actionable, provided it causes damage to C. Threats not only of bodily harm, but also of serious annoyance and damage, amount to such coercion or intimidation (*b*).

5. But now by the **Trade Disputes Act, 1906** (*c*), an act done in pursuance of an agreement or combination by two or more persons shall not, **if done in contemplation or furtherance of a trade dispute**, be actionable unless the act, if done without any such agreement or combination, would be actionable.

6. And moreover an act done by a **single individual** shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person or with the right of some other person to dispose of his capital or his labour as he will when such act is done **in contemplation or furtherance of a trade dispute** (*d*).

The last two propositions do not entirely destroy the effect of the first four, as they only apply to a **trade dispute**, which means "any dispute between employers and workmen, which is connected with

(*a*) *Supra.*

(*b*) Per Lord Lindley in *Quinn* v. *Leathem* (1901) A. C. at p. 540.

(*c*) 6 Edw. 7, c. 47, s. 1.

(*d*) *Ibid.* sect. 3 ; and see *Conway* v. *Wade* (1909) A. C. 506.

the employment or non-employment or the terms of the employment or with the conditions of labour of any person" (*e*). For all other purposes the first four propositions are still good law.

Maintenance and Champerty (*f*).—These wrongs are akin to malicious prosecution and other abuses of legal process. If A., without reasonable and probable cause, instigates B. to bring an action against C., A. is liable to C. in damages (*g*); for a person is not entitled to assist another's action, unless he has a common interest or acts from motives of kindred, affection or charity in aiding him (*h*). Motives of charity with or without reasonable ground afford a good defence to an action for maintaining the suit even of a stranger (*i*). The doctrine of maintenance does not apply to criminal proceedings (*k*). Champerty is that variety of

(*e*) *Ibid.* sect. 5 ; *Conway* v. *Wade*, *supra*.

(*f*) Pollock, 8th ed. pp. 334, 335.

(*g*) *Flight* v. *Lemon* (1843), 4 Q. B. 883 ; *Pechell* v. *Watson* (1841), 8 M. & W. 691.

(*h*) *Alabaster* v. *Harness* (1895) 1 Q. B. 339 (C. A.) ; *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1 ; *Scott* v. *N. S. P. C. C.* (1909), 25 T. L. R. 789 (master and servant) ; *British, &c., Conveyors* v. *Lamson* (1908) 1 K. B. 100. As to trade unions, see *Greig* v. *National Union of Shop Assistants* (1906), 22 T. L. R. 274 ; but see now *Bussy* v. *Amalgamated Society of Railway Servants* (1908), 24 T. L. R. 437, p. 13, *supra*.

(*i*) *Harris* v. *Brisco* (1886), 17 Q. B. D. 504 ; *Holden* v. *Thompson* (1907) 2 K. B. 489.

(*k*) *Grant* v. *Thompson* (1895), 72 L. T. 264.

maintenance where the consideration for the assistance is a share in the subject-matter of the action. There is nothing illegal in a sale by one person to another of information likely to lead to the recovery of property in consideration of a share of the property, if recovered. But if he contracts that he will himself recover the property or assist in recovering it or provide evidence by which it may be recovered taking as remuneration a share of the property, when recovered, the agreement is illegal and void (*l*).

(*l*) Per Parker, J., in *Wedgerfield* v. *de Bernardy* (1908), 24 T. L. R. at p. 497 (affirmed, C. A. (1908), 25 T. L. R. 21). See also *Rees* v. *de Bernardy* (1896) 2 Ch. 437.

CHAPTER VII.

OF LIBEL AND SLANDER (*a*).

A **defamatory statement** is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession, or trade. Such statement, if in writing, printing, or other permanent form, constitutes a **libel**; if in spoken words or significant gestures, a **slander**.

The distinction between libel and slander carries with it many important consequences. Thus, libel is both a civil wrong and a criminal offence. On the other hand, slander is a civil wrong only, though the words may happen to come within the criminal law as being blasphemous, seditious, or obscene, or as being a solicitation to commit a crime, or as being a contempt of court. Again, where a defamatory statement is written or printed, the law presumes that of necessity the person defamed has

(*a*) This chapter is mainly taken from the author's "Principles and Practice of the Law of Libel and Slander," 4th ed., Butterworth & Co., London, 1908.

suffered damage, and in the absence of legal justification or excuse the publication of such a statement is wrongful. On the other hand, spoken words are actionable only when they produce, as a natural consequence, the loss of some definite temporal advantage, or, as it is called, special damage, or when they come within certain specified categories (*b*).

It is sometimes said that libel can be distinguished from slander by the fact that the former is addressed to the eye, the latter to the ear. This is, no doubt, true as a general rule, but there appears to be at least one exception to it—the case of a defamatory statement communicated by significant gestures—*e.g.*, the finger language of the deaf and dumb. Such a case, so far as the author is aware, has never arisen, but it is submitted that it would be governed by the same rules as spoken words, and would therefore come under the description of slander. The real distinction is that in the case of libel the defamatory matter is in some permanent form ; and usually, though not necessarily, in writing or printing. For instance, a statue (*c*), caricature (*d*), effigy (*e*),

(*b*) See p. 138, *infra.*

(*c*) Hawkins' Pleas of the Crown, 8th ed. vol. i. p. 542.

(*d*) *Austin* v. *Culpepper* (1684), 2 Show. 313.

(*e*) 5 Rep. 125 ; *Eyre* v. *Garlick* (1878), 42 J. P. 68 ; *Monson* v. *Tussauds, Limited* (1894) 1 Q. B. 671.

chalk marks on a wall (*f*), "signs or pictures, as by fixing up a gallows on a man's door, or painting him in a shameful and ignominious manner" (*g*), may constitute a libel. Slander, on the other hand, is in its nature transient, and is always in the form of spoken words or significant gestures.

In order to be defamatory the words must refer to some particular individual, and the plaintiff must prove that he is that particular individual. In other words there must be a definite imputation on a definite person. "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual" (*h*). Even if the words are not intended to refer to the plaintiff but the jury find that reasonable people who knew the plaintiff thought that he was referred to, it is enough (*i*). And, provided that the plaintiff can satisfy the jury that he was especially referred to, it is sufficient (*k*) whether the words complained of describe him by his own name, or its initial letter (*l*), or by asterisks (*m*),

(*f*) *Tarpley* v. *Blabey* (1836), 7 C. & P. 395.

(*g*) Hawkins' Pleas of the Crown, 8th ed. vol. i. p. 542.

(*h*) Per Willes, J., in *Eastwood* v. *Holmes* (1858), 1 F. & F. 349.

(*i*) *Hulton* v. *Jones* (1910) A. C. 20; *Smith* v. *Sievier*, "Times" Newspaper (1910) July 7th.

(*k*) *Lawrence* v. *Newberry* (1891), 64 L. T. 797.

(*l*) *Roach* v. *Garvan* (1742), 2 Atk. 469; *O'Brien* v. *Clement* (1846), 15 M. & W. 435.

(*m*) *Bourke* v. *Warren* (1826), 2 C. & P. 307.

or by a fictitious name (*n*), or by the name of somebody else (*o*), or merely refer to a definite body of persons of which he is a member; for "if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated" (*p*).

But where it is uncertain whether the plaintiff was the particular individual aimed at, no action lies; *e.g.*, where, after the trial of an action at which there were three witnesses, the defendant said "One of you three is perjured," it was held that no action lay, as there was nothing to show that the plaintiff was the particular witness referred to (*q*).

Where the words are directed solely against a deceased person, *e.g.*, plaintiff's father, no civil action lies (*r*).

Further, the words complained of must concern the plaintiff himself. They must affect his character or touch him in the way of his profession or trade. If they are directed solely at the plaintiff's goods or his title to property, though an action may lie therefor,

(*n*) *Rex* v. *Clerk* (1729), 1 Barn. 304.

(*o*) *Levi* v. *Milne* (1827), 4 Bing. 195.

(*p*) Per Lord Campbell, C.J., in *Le Fanu and others* v. *Malcolmson* (1848), 1 H. L. C. 668.

(*q*) *Sir John Bourne's case*, cited Cro. Eliz. 497; see also *James* v. *Redditch* (1599), 4 Rep. 17.

(*r*) *Rex* v. *Darby* (1687), 3 Mod. 139; *Broome* v. *Ritchie*, (1904) 6 Fraser (Sc.), 942.

it is not an action of libel or slander, but "an action on the case for special damage sustained by reason of the speaking or publication" (*s*). In some cases, however, an attack on a man's title to property or goods may also injuriously affect his reputation. Thus, it is libellous to write and publish of a bookseller that he sells immoral poems (*t*); and to say of a wine-merchant that his wine is poisoned, or of a tea-dealer that his tea is made green by drying it on copper (*u*), or of a fishmonger that he is in the habit of selling decomposed fish (*x*), is a slander upon him in the way of his trade.

The matter complained of must be of a disparaging nature. Thus, it has been held libellous to write of a man that he is a man of straw (*y*), a hypocrite (*z*), a rascal (*a*), an impostor (*b*), that he is dishonest (*c*), ungrateful (*d*), impecunious (*y*), insane (*e*), and even,

(*s*) Per Tindal, C.J., in *Malachy* v. *Soper* (1836), 3 Bing. N.C. 371, and see p. 174, *infra*.

(*t*) *Tabart* v. *Tipper* (1808), 1 Camp. 350; 10 R. R. 698.

(*u*) Per Coltman, J., in *Ingram* v. *Lawson* (1840), 6 Bing. N.C at p. 216.

(*x*) Per Lord Halsbury, L.C., in *Linotype Co., Ld.* v. *British, &c. Co., Ld.* (1899), 81 L. T. at p. 333.

(*y*) *Eaton* v. *Johns* (1842), 1 Dowl. N. S. 602.

(*z*) *Thorley* v. *Lord Kerry* (1812), 4 Taunt. 355; 13 R. R. 626.

(*a*) *Villers* v. *Monsley* (1769), 2 Wils. 403.

(*b*) *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769.

(*c*) *Austin* v. *Culpepper* (1684), Skin. 123.

(*d*) *Cox* v. *Lee* (1869), L. R. 4 Ex. 284.

(*e*) *Morgan* v. *Lingen* (1863), 8 L. T. 800.

in one case, that his conduct has been unfeeling (*f*). So, too, ironical praise may amount to a libel (*g*), and it has been held libellous to publish in a newspaper a story in which the plaintiff is made to appear ridiculous, even though he has told it himself in the first instance (*h*).

On the other hand, it has been held not libellous to write of a man that he endeavoured to discourage sedition in Ireland, for this would not injure him in the opinion of good citizens and respectable people (*i*); or that he sued his mother-in-law in a county court, for he may have properly done so (*k*); or that he owes money, for this does not imply that he cannot pay his debts (*l*); or that he is "Man Friday" (*m*), "for the man Friday, as we all know, was a respectable man, although a black man" (*n*). Nor is it libellous to publish the portrait of any one without his authority, even when unlike him (*o*).

In order to determine whether a statement is

(*f*) *Churchill* v. *Hunt* (1819), 2 B. & Ald. 685; 22 R. R. 807.
(*g*) *Boydell* v. *Jones* (1838), 4 M. & W. 446.
(*h*) *Cook* v. *Ward* (1830), 6 Bing. 409; 31 R. R. 456.
(*i*) *Clay* v. *Roberts* (1863), 9 Jur. N. S. 580.
(*k*) *Cox* v. *Cooper* (1863), 12 W. R. 75.
(*l*) Per Bramwell, B., in *Re Coghlan* (1864), 4 F. & F. 316.
(*m*) *Forbes* v. *King* (1833), 1 Dowl. 672; 2 L. J. Ex. 109.
(*n*) Per Lord Denman, C.J., in *Hoare* v. *Silverlock* (1848), 12 Q. B. at p. 626.
(*o*) *Corelli* v. *Wall* (1906), 22 T. L. R. 532.

defamatory it must be construed in its natural and ordinary meaning; if not defamatory in such meaning it must be construed in the special meaning, if any, in which it was understood by the person by and to whom it was published (*p*).

It is for the judge to say whether the words are reasonably capable of a defamatory meaning, but for the jury to say whether under the circumstances of the case they in fact bear that meaning (*q*). In the case of *Nevill* v. *Fine Art and General Insurance Co.* (*r*), in the House of Lords, it was pointed out by Lord Halsbury, L.C., that in order to justify the judge in leaving the case to the jury "the words must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining." It is not enough to say that by some person or another the words *might* be understood in a defamatory sense" (*s*).

Where words are reasonably capable of an innocent and a defamatory meaning it is a question of

(*p*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741; 52 L. J. Q. B. 232; *Frost* v. *London Joint Stock Bank* (1906) 22 T. L. R. 760; *Beswick* v. *Smith* (1908), 24 T. L. R. 169.

(*q*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741; cf. *Leon* v. *Edinburgh Evening News* (1909) S. C. 1014, and *Heaton* v. *Goldney* (1910) 1 K. B. 754.

(*r*) (1897) A. C. at pp. 76, 77.

(*s*) (1897) A. C. at p. 73.

fact for the jury in what meaning they were actually understood (*t*). And in every case the burden of proof is on the party who alleges that the words were understood in a meaning other than their natural and ordinary meaning. "If the word is an ordinary English word, then the Court will construe it in its natural meaning, unless some other is shown to have been given it. If the word is a cant expression or a commercial term (*u*), then the meaning may depend upon the circumstances in evidence" (*x*). But where the words complained of are ordinary English, and perfectly intelligible on the face of them, the plaintiff cannot call witnesses to state what they understood the words to mean, unless, indeed, he first show that the words did not on this occasion bear their ordinary English meaning (*y*).

It is important to notice that where the words are not defamatory in the natural and ordinary sense, the plaintiff must be prepared to satisfy the jury that there were facts known both to the person publishing the defamatory matter and to the person to whom it was published which would naturally

(*t*) *Churchill* v. *Gedney* (1889), 53 J. P. 471; *Ritchie* v. *Sexton* (1891), 64 L. T. 210.

(*u*) *Smith* v. *Jeffreys* (1846), 15 M. & W. 561; 15 L. J. Ex. 325.

(*x*) Per Bramwell, B., in *Barnett* v. *Allen* (1858), 27 L. J. Ex. at pp. 414, 415.

(*y*) *Daines* v. *Hartley* (1848), 3 Ex. 200.

lead the latter to understand the words in a defamatory sense. As was pointed out by Brett, L.J., in the well-known case of *Capital and Counties Bank* v. *Henty* (*z*), "The first question for the jury is, whether the document would be read in a defamatory sense by persons of ordinary reason in the position of those to whom it is published. If in the opinion of the jury it would not be so read according to the *primâ facie* meaning of the language, then there is a further question (if there is any evidence upon which it can be raised), whether there were facts known both to the person who framed the alleged libel and to the persons to whom it was published, which would lead the latter reasonably to put upon the document the construction that, having a second defamatory sense, it was issued ironically, or otherwise than in the primary sense of the language." In that case Messrs. Henty, some brewers at Chichester, issued to their tenants a circular containing the following words:—"Messrs. Henty & Sons hereby give notice that they will not receive in payment any cheques drawn on any of the branches of the Capital and Counties Bank." The issue of this circular caused a run upon the bank, who thereupon brought an action of libel against Messrs. Henty. It was, however, held that the

(*z*) (1880), 5 C. P. D. at p. 539 (in C. A.); *Beswick* v. *Smith* (1908), 24 T. L. R. 169.

words in their natural and ordinary meaning were not libellous; that therefore it was for the plaintiffs to prove that, by reason of the special circumstances of the case, they were understood in a special libellous sense; and that, in the absence of any such evidence, there was no case to go to the jury, and there must, therefore, be judgment for the defendants. Moreover, when the words are not *primâ facie* defamatory, and when the plaintiff therefore intends to maintain that the words were defamatory by reason of their being understood in a special sense, he must be careful to insert in his Statement of Claim an averment specifying the defamatory meaning of the words complained of, and showing how they come to have that meaning, and how they relate to the plaintiff (*a*). Such an averment is called an **Innuendo.** No innuendo is necessary where the words complained of are defamatory in their ordinary meaning (*b*).

No action can be maintained for libel or slander unless there be publication, *i.e.*, a communication by the defendant of the words complained of to some person other than the plaintiff. Thus, there is no publication, and therefore no action will lie, if the defamatory matter be communicated only to the

(*a*) *Russell and another* v. *Webster* (1874), 23 W. R. 59.

(*b*) Per Lord Selborne, in *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 748.

plaintiff. This was expressly decided in *Barrow* v. *Lewellin* (*c*), where the defendant despatched a sealed letter through the post to the plaintiff. As Lord Esher, M.R., said, in the case of *Pullman* v. *Hill & Co.* (*d*), "If the statement is sent straight to the person of whom it is written, there is no publication of it, for you cannot publish a libel of a man to himself. If a letter is not communicated to anyone but the person to whom it is written, there is no publication of it." It is, however, otherwise if it can be proved that the defendant knew when he posted the letter containing the libel that it would probably be opened by some person other than the plaintiff, for example, his clerk (*e*). So, too, "if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it" (*f*), for example, if he shows it to his clerk, or places it in the hands of a typewriter, in order that such clerk or typewriter may copy it for him, there is a publication of the letter (*g*), though the circumstances may be such that the occasion of

(*c*) (1615), Hob. 62.

(*d*) (1891) 1 Q. B. at p. 527.

(*e*) *Delacroix* v. *Thevenot* (1817), 2 Stark. 63; *Gomersall* v. *Davies* (1898), 14 Times L. R. 430; *Sharp* v. *Skues* (1909), 25 T. L. R. 336 (C. A.).

(*f*) Per Lord Esher, M.R., in *Pullman* v. *Hill & Co.* (1891) 1 Q. B. at p. 527.

(*g*) *Pullman* v. *Hill, supra; Boxsius* v. *Goblet Frères* (1894) 1 Q. B. 842.

publication may be privileged (*h*). Similarly, it has been held that there is a publication if the libel be written on a post-card (*i*), or contained in a telegram (*k*), for in each case "it is necessarily communicated to all the clerks through whose hands it passes" (*l*).

In accordance with the common law principle that husband and wife are one person, "the uttering of a libel by a husband to his wife is no publication" (*m*). "For many purposes they are, however, essentially distinct and different persons, —and amongst others, for the purpose of having the honour and feelings of the husband assailed and injured by acts or communications made to the wife" (*n*); thus, it has been held that sending a defamatory letter to a wife about her husband is sufficient publication (*o*).

Is the question of publication for the judge or for the jury? It is for the jury to find whether the facts on which it is endeavoured to prove publication

(*h*) *Edmondson* v. *Birch* (1907) 1 K. B. 371 (C. A.); distinguishing *Pullman* v. *Hill*, *supra*.

(*i*) *Robinson* v. *Jones* (1879), L. R. 4 Ir. 391.

(*k*) *Whitfield* v. *S. E. Ry. Co.* (1858), E. B. & E. 115.

(*l*) Per Brett, J., in *Williamson* v. *Freer* (1874), L. R. 9 C. P. 393.

(*m*) Per Huddleston, B., in *Wennhak* v. *Morgan* (1888), 20 Q. B. D. at p. 537.

(*n*) Per Maule, J., in *Wenman* v. *Ash* (1853), 13 C. B. 844, 845.

(*o*) *Wenman* v. *Ash* (1853), 13 C. B. 836; 22 L. J. C. P. 190.

are true, but for the judge to decide whether the facts as proved constitute a publication.

Generally, *i.e.*, in all cases not coming within the exceptional class of cases presently to be noticed (*p*), the actionable or innocent character of words depends not on the intention with which they were published, but on their actual meaning and tendency when published, and the defendant will not be excused on the ground that he published the libel by accident or mistake (*q*), or in jest (*r*), or with an honest belief in its truth (*s*). Thus, the defendant was held liable in *Cook* v. *Ward* (*t*), where the plaintiff told some friends an absurd story about himself, and the defendant published it in his newspaper, simply for the purpose of amusing his readers, and believing that the plaintiff would not object. And in *Blake* v. *Stevens and others* (*u*), the plaintiff obtained 100*l.* damages against the defendants for the publication of a libellous statement, which had been inserted by

(*p*) See pp. 150–151, 157–166, *infra*.

(*q*) *Blake* v. *Stevens and others* (1864), 11 L. T. 543 ; 4 F. & F. 232 ; *Shepheard* v. *Whitaker* (1875), L. R. 10 C. P. 502.

(*r*) 9 Rep. 59 ; and *Donoghue* v. *Hayes* (1831), Hayes' Irish Ex. Rep. 265.

(*s*) *Blackburn* v. *Blackburn* (1827), 4 Bing. 395 ; 3 C. & P. 146 ; 29 R. R. 583 ; per Maule, J., in *Wenman* v. *Ash* (1853), 13 C. B. 836 ; 22 L. J. C. P. 190 ; *Huntley* v. *Ward* (1859), 6 C. B. N. S. 514 ; 1 F. & F. 552.

(*t*) (1830), 6 Bing. 409 ; 31 R. R. 456.

(*u*) (1864), 11 L. T. 543 4 F. & F. 232.

mistake in a law book of which they were the publishers.

An action for libel lies on mere proof of publication, even though the plaintiff does not prove that he has suffered any special damage, i.e., the loss of some definite temporal advantage.

But the plaintiff, in an action for slander, must prove special damage, except in four cases—

1. Where the words charge plaintiff with having committed a criminal offence (*not* necessarily an indictable offence) which the Court has power, if it chooses, to punish by imprisonment in the first instance, as distinct from cases where the imprisonment can only be inflicted if the offender makes default in paying a fine (*x*).

2. Where they impute that the plaintiff has an infectious or contagious disease (*y*).

3. Where they are spoken of him in relation to his trade, profession, or business. Thus, it is not actionable to call a stonemason a ringleader of the nine hours system, since this does not affect him in his capacity or conduct as a stonemason (*z*).

4. Where the plaintiff is a woman or girl, and

(*x*) *Hellwig* v. *Mitchell* (1910) 1 K. B. 609 ; *Michael* v. *Spiers and Pond* (1909), 101 L. T. 382 ; *Webb* v. *Bevan* (1883), 11 Q. B. D. 609.

(*y*) *Villers* v. *Monsley* (1769), 2 Wils. 403.

(*z*) *Miller* v. *David* (1874), L. R. 9 C. P. 118.

the words impute unchastity or adultery to her (*a*).

As to repetition of libel and slander.—It is no defence to an action for libel or slander that the defendant published it by way of repetition or hearsay (*b*), or that he gave his authority for the words complained of (*c*); or except when the occasion is privileged (*d*) that he believed the words to be true (*e*). But in the case of libel it will be a good defence for the defendant to prove that he has only taken a subordinate part in disseminating the libel, and that he did not know that the paper contained or was likely to contain a libel, and that he ought not to have known it having used reasonable care (*f*).

It not infrequently happens, in cases of slander, where the words are not actionable *per se*, that the person repeating the slander is in a worse position than the person from whom he heard it; for if the special damage necessary to support the action

(*a*) Slander of Women Act, 1891 (54 & 55 Vict. c. 51).

(*b*) *Watkins* v. *Hall* (1868), L. R. 3 Q. B. 396.

(*c*) *M'Pherson* v. *Daniels* (1829), 10 B. & C. 263.

(*d*) See pp. 150–151, 157–166, *infra*.

(*e*) Per Blackburn, J., in *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. at p. 202.

(*f*) Per Lord Esher, M.R., in *Emmens* v. *Pottle* (1885), 16 Q. B. D. at p. 357; and per Bowen, L.J., *ibid.* at p. 358. See also *Vizetelly* v. *Mudie's Select Library, Ld.* (1900) 2 Q. B. 170 (C. A.).

flows from the repetition, and not from the original publication of the words, the repeater may alone be liable, while the originator escapes; in such a case, however, the original utterer of the slander is himself liable for the repetition (1) where he authorises its repetition (*g*), or (2) where he speaks in the presence of someone under a duty to repeat his words, knowing of the existence of such duty.

A corporation or company can sue for a libel affecting its property (*h*); it can also sue for slander in relation to its trade or business. The doctrine of *respondeat superior* applies to libel and slander quite as much as to other torts (*i*).

The defences peculiar to an action of libel are four in number, viz.:—

I. Justification.

II. Fair comment.

III. Privilege.

IV. Apology.—This defence is, however, only available where the libel is "contained in a public newspaper or other periodical publication."

(*g*) *Watkins* v. *Hall* (1868), L. R. 3 Q. B. 396.

(*h*) *Mayor, &c., of Manchester* v. *Williams* (1891) 1 Q. B. 94; *South Hetton Coal Co.* v. *N. E. News Association, Limited* (1894) 1 Q. B. 133.

(*i*) See pp. 32–40, *supra*; and *Citizen's Life Assce. Co.* v. *Brown* (1904) A. C. 423; and *Finburgh* v. *Moss' Empires* (1908) S. C. 928.

Similar defences, with the exception of IV., are open to the defendant in an action of slander.

If a defendant in one action admits that the statements he made are defamatory and untrue, he is not thereby prevented from setting up the defences of fair comment and privilege in another action brought in respect of another publication of them (*k*).

I. Justification.

It is a good defence to an action of libel or slander that the words complained of are true (*l*).

The defendant must set out in his defence particulars of the facts upon which he relies (*m*) and, at the trial, must prove that the *whole* libel is *substantially* true. Thus, where the libel complained of is an article or paragraph preceded by a title, it is not sufficient to prove the truth of the facts stated in the article or paragraph: the title itself must be justified, or the plaintiff will succeed. So that in *Bishop* v. *Latimer* (*n*), where a newspaper published

(*k*) *Mangena* v. *Wright* (1909) 2 K. B. 958.

(*l*) In criminal proceedings this is not enough; the defendant must then be prepared to go further and prove that not only are the words true, but also that it is for the public benefit that they should be published.

(*m*) *Arnold* v. *Bottomley* (1908) 2 K. B. 151.

(*n*) (1861), 4 L. T. N. S. 775.

a paragraph preceded by the title, "How Lawyer B. treats his Clients," which contained a report of a case in which *one* client of Lawyer B. had been badly treated, it was held, although the case itself was accurately reported, that the title was not justified by the facts, and that the plaintiff was entitled to damages. In another case, *Clement* v. *Lewis and others* (*o*), where a newspaper had published a correct report of certain proceedings in the Insolvent Debtors Court, preceded by the title "Shameful Conduct of an Attorney," the report was held privileged, but damages were recovered for the title.

If there is gross exaggeration, the plea of justification will fail. Thus, in *Clarkson* v. *Lawson* (*p*), where the libel stated that the plaintiff, a proctor, had been three times suspended for extortion, it was held to be no justification to prove that he had been *once* so suspended. So, where the defendant had stated that the plaintiff was a "libellous journalist," it was held that a plea of justification was not supported by proof that the plaintiff had libelled one person, who had obtained judgment against him for 100*l*. (*q*).

So if an account of a trial be published setting

(*o*) (1822), 3 Br. & Bing. 297 ; 7 Moore, 200 ; 22 R. R. 533.

(*p*) (1829–1830), 6 Bing. 266, 587 ; 31 R. R. 418, 425.

(*q*) *Wakley* v. *Cooke and Healey* (1849), 19 L. J. Ex. 91 ; 4 Ex. 511.

out counsel's speech, and stating that the facts opened were proved, when actually the evidence only bore out part of the facts so stated, it is no defence to plead that the facts were so stated by counsel—the facts so stated must be proved true, or the defendant will fail (*r*).

On the other hand, it is not necessary to justify every detail of the charge or general terms of abuse, provided that the gist of the libel is proved to be in substance correct, and that the details, &c., which are not justified, produce no different effect on the mind of the reader than the actual truth would do (*s*). Thus, where the libel complained of was that "L., B., and G. are a gang who live by card-sharping," it was held to be sufficient justification to prove that upon two distinct occasions L., B., and G. had cheated at cards (*t*).

II. Fair Comment.

No action lies if the defendant can prove that the words complained of are a fair comment on a matter of public interest.

The Court decides whether the matter commented on is one of public interest (*u*) : the jury, if the Court

(*r*) *Lewis* v. *Walter* (1821), 4 B. & Ald. 605 ; 23 R. R. 415.
(*s*) *Willmett* v. *Harmer and another* (1837), 8 C. & P. 695.
(*t*) *Reg.* v. *Labouchere* (1880), 14 Cox, C. C. 419.
(*u*) Per Lopes, L.J., in *South Hetton Coal Co.* v. *N. E. News Association* (1894) 1 Q. B. at p. 141; and Collins, M.R., in

is of opinion that there is some evidence that the comment is unfair, finds whether it is so in fact (*x*).

If the judge thinks that there is no evidence on which a rational verdict could be found to the effect that the comment is unfair or dishonest he should stop the case (*y*).

"It is incorrect to say, as some writers do, that *bonâ fide* comments on matters of public interest come under qualified privilege" (*z*). The defence in such a case really is, that the words are not defamatory—that fair and proper comment is no libel (*a*). "It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all" (*b*). If such comments *were* privileged, in order to succeed plaintiff

Dakhyl v. *Labouchere*, Times, July 29th, 1904 (C. A.; in the H. L. (1908) 2 K. B. 325 n.).

(*x*) Per Lopes, L.J., in *South Hetton Coal Co.* v. *N. E. News Association* (1894) 1 Q. B. at p. 141.

(*y*) Per Collins, M.R., in *McQuire* v. *Western Morning News* (1903) 2 K. B. at pp. 112, 113.

(*z*) Per Blackburn, J., in *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769. See also the observations of Lord Esher, M.R., and Bowen, L.J., in *Merivale* v. *Carson* (1887), 20 Q. B. D. 275; and Collins, M.R., in *Dakhyl* v. *Labouchere*, Times, 29th July, 1904 (in H. L. (1908) 2 K. B. 325 n.). And see *Hunt* v. "*Star*" *Newspaper Co.* (1908) 2 K. B. 309.

(*a*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769.

(*b*) Per Bowen, L.J., in *Merivale* v. *Carson* (1887), 20 Q. B. D. at p. 283.

would have to prove malice, however false and injurious the words complained of may have been, while defendant would only have to prove that at the time he made the charges be believed that they were true, and this is certainly not the law.

"Fair comment."—The limits of fair comment on matters of public interest are very wide. "Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment. . . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said?" (*c*).

"The nearest approach, I think, to an exact definition of the word 'fair' is contained in the judgment of Lord Tenterden, C.J., in *Macleod* v. *Wakley* (*d*), where he said, 'Whatever is fair and

(*c*) Per Esher, M.R., in *Merivale* v. *Carson* (1887), 20 Q. B. D. at pp. 280, 281. See the observations of Fletcher Moulton, L.J., on this case in *Hunt* v. "*Star*" *Newspaper Co.* (1908) 2 K. B. at p. 318.

(*d*) (1828), 3 C. & P. at p. 313; cf. *Thomas* v. *Bradbury* (1906) 2 K. B. 627.

can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; then it will be a libel.' It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism. . . . The writer would be travelling out of the region of fair criticism . . . if he imputes to the author that he has written something which in fact he has not written" (*e*).

And the question whether the words are or are not fair comment is essentially for the jury. "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men or the proceedings in courts of justice or in Parliament, or the publication of a scheme or a literary work. But it is always left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not allowed to overstep these limits" (*f*).

(*e*) Per Bowen, L.J., in *Merivale* v. *Carson* (1887), 20 Q. B. D. at pp. 283, 284.

(*f*) Per Crompton, J., in *Campbell* v. *Spottiswoode* (1863), B. & S. at p. 778.

Comment must be honest. "'Fair' embraces the meaning of honest and also of relevancy. The view expressed must be honest and must be such as can fairly be called criticism" (*g*). Criticism must not be made a cloak for malice, and it is therefore open to the plaintiff to show that the defendant has been actuated by malice (*h*). There should be no insinuation of improper and dishonourable conduct, unless the critic can prove that there are facts to warrant it (*g*); and it is no defence that defendant honestly believed the charges to be true (*i*).

The matter commented on must be actual fact. The very statement, indeed, of the rule set out on pp. 143, 144, *supra*, "assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented in what would be a fair and *bonâ fide* manner on the supposition that the facts were true. . . . If the facts as a comment upon which the publication is sought to be excused do not exist, the foundation of the plea

(*g*) Per Collins, M.R., in *McQuire* v. *Western Morning News* (1903) 2 K. B. at p. 110; Vaughan Williams, L.J., in *Joynt* v. *Cycle Trade Publishing Co.* (1904) 2 K. B. at p. 298. See also the observations of Lord Atkinson in *Dakhyl* v. *Labouchere* (1908) 2 K. B. at p. 329 (H. L.).

(*h*) *Thomas* v. *Bradbury* (1906) 2 K. B. 627.

(*i*) Per Cockburn, C.J., in *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185; *Brenon* v. *Ridgway* (1887), 3 Times L. R. 592.

fails" (*k*). "A comment cannot be fair which is built upon facts which are not truly stated" (*l*). This reasoning does not, it seems, apply where a person other than the defendant has alleged the facts and the defendant has simply commented on them (*m*). A newspaper may not set out evidence which might have been, but was not in fact, given, and suggest as an inference therefrom that the prisoner, though acquitted, was really guilty (*n*). It may comment on evidence actually given (*o*), but may not charge a witness with having committed perjury (*p*). The defendant will not, however, be liable for trivial mistakes made accidentally, for "it is not to be expected that a public journalist will always be infallible" (*q*).

Matter of public interest.—Under this description come all State matters; everything which concerns Government, either House of Parliament, or any

(*k*) Per cur. in *Lefroy* v. *Burnside* (1879), 4 L. R. Ir. at p. 565; see also *Davis & Sons* v. *Shepstone* (1886), 11 App. Cas. at p. 190, and *Joynt* v. *Cycle Trade Publishing Co.* (1904) 2 K. B. at p. 297.

(*l*) Per Kennedy, J., in *Joynt* v. *Cycle Trade Publishing Co.* (1904) 2 K. B. at p. 294.

(*m*) *Mangena* v. *Wright* (1909) 2 K. B. 958.

(*n*) *Rex* v. *White and another* (1808), 1 Camp. 359, n.; 10 R. R. 705, n.

(*o*) *Hedley* v. *Barlow* (1865), 4 F. & F. 224.

(*p*) *Roberts* v. *Brown* (1834), 10 Bing. 519.

(*q*) Per Cockburn, C.J., in *Woodgate* v. *Ridout* (1865), 4 F. & F. 217.

committee thereof (*r*); the public conduct of every one who takes part in public affairs (*s*), but not the private conduct of such persons, save in so far as it affects their public relations (*t*); legal (*u*) and ecclesiastical matters (*x*); the management of the poor and the administration of the poor law (*y*); places of public amusement or entertainment (*z*); literature (*a*), but not the private character of an author (*b*) or journalist (*c*); art (*d*); anything, in short, which invites public attention or criticism (*e*).

(*r*) *Dunne* v. *Anderson* (1825), 2 Bing. 88; 1 Moore, 407; R. & M. 287; 28 R. R. 591; *Wason* v. *Walter* (1870), L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; *Henwood* v. *Harrison* (1872), L. R. 7 C. P. 606.

(*s*) Per Bramwell, B., in *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. at p. 689; 35 L. J. Q. B. 209.

(*t*) *Wisdom* v. *Brown* (1885), 1 Times L. R. 412; *Pankhurst* v. *Hamilton* (1887), 3 Times L. R. 500.

(*u*) Per Cockburn, C.J., in *Cox* v. *Feeney* (1863), 4 F. & F. 13; and in *Purcell* v. *Sowler* (1877), 2 C. P. D. 218 (C. A.).

(*x*) *Kelly* v. *Tinling* (1865), L. R. 1 Q. B. 699; 35 L. J. Q. B. 231.

(*y*) Per Cockburn, C.J., in *Purcell* v. *Sowler* (1877), 2 C. P. D. 215 (C. A.); 46 L. J. C. P. 308.

(*z*) *Dibdin* v. *Swan & Bostock* (1793), 1 Esp. 28; 5 R. R. 717; *Green* v. *Chapman* (1837), 4 Bing. N. C. 92; 5 Scott, 340; *McQuire* v. *Western Morning News* (1903) 2 K. B. 100; *Henwood* v. *Harrison*, *supra*.

(*a*) *Campbell* v. *Spottiswoode* (1863), 32 L. J. Q. B. 185; 3 B. & S. 769; *Thomas* v. *Bradbury* (1906) 2 K. B. 627.

(*b*) *Fraser* v. *Berkeley* (1836), 7 C. & P. 621.

(*c*) *Russell and another* v. *Webster* (1874) 23 W. R. 59.

(*d*) *Thompson* v. *Shackell* (1828) M. & M. 187; 31 R. R. 728.

(*e*) *Morrison* v. *Belcher* (1863), 3 F. & F. 614; *Duplany* v. *Davis* (1887), 3 Times L. R. 184; *Merivale* v. *Carson* (1887), 20 Q. B. D.

III. Privilege.

In certain cases, even though the words spoken or written be slanderous or libellous, in the interests of public policy the speaker or writer is not liable—in other words, the occasion is privileged.

On privileged occasions there is either:—

A. Absolute privilege—where the public interest, or the due administration of justice, renders the existence of malice immaterial; or

B. Qualified privilege—where on proof of malice plaintiff succeeds.

Upon occasions of qualified privilege no action lies unless the plaintiff prove malice in fact. The burden of proving this is on him, as was settled in *Clark* v. *Molyneux* (*f*). Malice in fact is not confined to personal spite and ill-will, but includes every unjustifiable intention to inflict injury on the person defamed, or, in the words of Brett, L.J., every wrong feeling in a man's mind (*g*).

It would greatly tend to accuracy of thought and clearness of expression in connection with this

275 (C. A.); *Dakhyl* v. *Labouchere* (1908) 2 K. B. 325, n. (H. L.).

(*f*) (1872), 3 Q. B. D. 237; see also *Jenoure* v. *Delmege* (1891) A. C. 73. It is sufficient to prove that the defendant's agent was malicious, if he published the defamatory words in the course of his employment: *Fitzsimmons* v. *Duncan* (1908), 2 Ir. R. 483.

(*g*) Per Lindley, L.J., in *Stuart* v. *Bell* (1891) 2 Q. B. at p. 351.

branch of the law if the word *malice* were only used in the above sense, *i.e.*, as denoting malice in fact.

It is unnecessary and leads to confusion to use it in the sense of malice in law, *i.e.*, the intention of doing an act which in fact is the breach of a general legal duty, whether the actor knows it or not.

Defining malice, then, as malice in fact, it is true to say that, in considering the defendant's *liability* in an action for libel or slander, malice is immaterial, except where a question of qualified privilege or fair comment or fair and *bonâ fide* report is raised (*h*).

A. The following are the cases of absolute privilege (*i*):

1. Parliamentary proceedings.

2. Judicial proceedings.

3. Naval, military, and State proceedings.

1. Parliamentary proceedings. No member is in any way responsible for anything said in the House (*k*); but this privilege does not extend to

(*h*) On the other hand, the existence or non-existence of malice is often a material factor in considering what *damages* the plaintiff is entitled to.

(*i*) I am indebted to Mr. W. Blake Odgers, K.C., for this threefold division, and also for that on pp. 157, 158, *infra*. See pp. 218, 234, of that learned Author's "Digest of the Law of Libel and Slander," 4th ed.

(*k*) Bill of Rights (1 Will. & M. st. 2, c. 2.)

anything said outside the walls of the House, or to a speech printed and privately circulated outside the House (*l*).

At common law, even if the whole House ordered the publication of parliamentary reports and papers, no privilege attached. This was laid down in the famous case of *Stockdale* v. *Hansard* (*m*), which was followed by the statute 3 & 4 Vict. c. 9. By this statute, all reports, &c., published by order of either House of Parliament are absolutely privileged, and all proceedings, civil or criminal, are to be stayed at once on production of a certificate to that effect. A newspaper which publishes extracts from State papers (*n*) or public registers (*o*) is absolutely privileged.

Reports of parliamentary proceedings, other than those protected by this statute, are conditionally, not absolutely, privileged (*p*).

2. Judicial proceedings. No action lies for defamatory statements made or sworn in the course of a judicial proceeding before any court of competent jurisdiction.

(*l*) *Rex* v. *Abingdon* (1794), 1 Esp. 226 ; 5 R. R. 733 ; *Rex* v. *Creevey* (1813), 1 M. & S. 273 ; 14 R. R. 427.

(*m*) (1837), 7 C. & P. 731.

(*n*) *Mangena* v. *Lloyd* (1908), 98 L. T. 640 ; *Mangena* v. *Wright* (1909) 2 K. B. 958.

(*o*) *Jones* v. *Financial Times* (1909), 25 T. L. R. 677 (C. A.) ; and see *Searles* v. *Scarlett* (1892) 2 Q. B. 56.

(*p*) See pp. 168—170, *infra*.

"The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed" (*q*). "The ground of that rule is public policy" (*r*). Thus, every statement made by either party or a witness to his solicitor or counsel (*s*) and all pleadings (*t*) and affidavits (*u*) are **absolutely privileged.** So too reports made by an Official Receiver in the course of his duty are absolutely privileged (*v*). Similarly every statement made by an advocate whilst acting in that capacity, whether counsel or solicitor (*x*), or the party in

(*q*) Per Lopes, L.J., in *Royal Aquarium, &c. Co.* v. *Parkinson* (1892) 1 Q. B. at p. 451.

(*r*) Per Lord Esher, M.R., *ibid.*, at p. 442.

(*s*) *Bank of British North America* v. *Strong* (1876), 1 App. Cas. 307; *Watson* v. *Jones* (1905) A. C. 480.

(*t*) *Lord Beauchamps* v. *Sir R. Croft* (1568), Dyer, 285 a.

(*u*) *Lilley* v. *Roney* (1892), 8 Times L. R. 642.

(*v*) *Bottomley* v. *Brougham* (1908) 1 K. B. 584; *Burr* v. *Smith* (1909) 2 K. B. 306.

(*x*) *Munster* v. *Lamb* (1883), 11 Q. B. D. 588.

person (*y*), is **absolutely privileged**, no matter how false or malicious or irrelevant to the matter in issue the words complained of may have been (*z*).

With regard to **witnesses, jurors,** and **judges of inferior courts,** the rule laid down above requires qualification. Every statement made by a witness in the box is **absolutely privileged**, provided that it refers to the inquiry before the court, and this is so even if the statement in question is volunteered (*a*); but no privilege would attach to the statements of a witness wholly unconnected with the matter in issue, and made entirely on his own account and to serve his own ends, or to statements made before entering or after leaving the box and unconnected with the preparation or conduct of the case (*b*). So, too, every observation of a juror is absolutely privileged if connected with the matter in issue (*c*).

As regards words spoken by a judge, the general rule laid down above is true only of the **judges of the superior courts** (*d*). Every statement made in office by a judge of a superior court is **absolutely privileged**, and under no circumstances will an

(*y*) *Hodgson* v. *Scarlett* (1818), 1 B. & Ald. 244 ; 19 R. R. 301.

(*z*) *Munster* v. *Lamb* (1883), 11 Q. B. D. 588.

(*a*) *Seaman* v. *Netherclift* (1876), 2 C. P. D. 53.

(*b*) *Trotman* v. *Dunn* (1815), 4 Camp. 211 ; *Watson* v. *Jones* (1905) A. C. 480.

(*c*) *Rex* v. *Skinner* (1772), Lofft, 55.

(*d*) For definition of superior court, see p. 18, *supra*.

action lie therefor (*e*). A similar privilege is extended to words spoken in office by the judge of an inferior court of record, provided that he has jurisdiction in the matter before him. If he knows, or ought to know, that he has no jurisdiction, he is in no way protected (*f*). No privilege attaches to words spoken out of office (*g*). Everything said in office by a justice of the peace is also absolutely privileged, and no action lies therefor (*h*).

It is, however, important to notice that this privilege is confined to statements made in the course of strictly judicial proceedings, and is one which will not be extended. "It belongs to courts recognised by law, and to such courts only" (*i*). In *Barratt* v. *Kearns* (*k*) it was held that an inquiry held by an ecclesiastical commission appointed under the Pluralities Acts is a judicial inquiry, and that, therefore, a statement made by a witness at such inquiry was absolutely privileged. A meeting of the London County Council for granting music and dancing licences is not a court exercising judicial functions, and, therefore, defamatory statements

(*e*) *Anderson* v. *Gorrie* (1895) 1 Q. B. 668.

(*f*) *Houlden* v. *Smith* (1850), 19 L. J. Q. B. 70; *Scott* v. *Stanfield* (1868), L. R. 3 Ex. 220.

(*g*) *Paris* v. *Levy* (1861), 30 L. J. C. P. 12.

(*h*) *Law* v. *Llewelyn* (1906) 1 K. B. 487.

(*i*) Per Lopes, L.J., in *Royal Aquarium, &c. Co.* v. *Parkinson* (1892) 1 Q. B. at p. 451.

(*k*) (1905) 1 K. B. 504 (C. A.).

made by a county councillor at such a meeting with regard to a person applying for a licence are not absolutely protected, but have only a qualified privilege, which may be rebutted by proof of express malice (*l*).

Similarly "proceedings before licensing justices, even though the justices are bound to show judicial discretion, are administrative and not judicial. In such cases the privilege is qualified and not absolute" (*m*).

Reports of judicial proceedings are not absolutely, only conditionally, privileged (*n*). There is a possible exception to this in the case of such reports published in a newspaper, and which fall within the protection of sect. 3 of the Law of Libel Amendment Act, 1888. The point has not yet been decided in Court, but it has been held in Chambers that such reports are *absolutely* privileged (*o*).

3. Naval, military, and State proceedings. Everything done in the course of any naval or military proceeding is **absolutely privileged.** Volunteers when in training are under military law within this

(*l*) *Royal Aquarium, &c., Co.* v. *Parkinson* (1892) 1 Q. B. 431; see also *Hodson* v. *Pare* (1899) 1 Q. B. 455.

(*m*) Per Darling, J., in *Mann, Crossman & Paulin, Ld.* v. *Pinhorn*, "Times" Newspaper, February 1, 1910.

(*n*) See pp. 158, 166—168, *infra*.

(*o*) *Hope* v. *Leng*, March 19th, 1906. For the arguments in support of this contention, see the Author's "Principles and Practice of the Law of Libel and Slander," 4th ed. p. 125, Butterworth & Co., London, 1908.

principle (*p*). Thus, any defamatory statement made before a naval or military court-martial, no matter how untrue and malicious, is protected (*q*). Similarly, no action lies in respect of such a statement in a report made in the course of military or naval duty (*r*). For reasons of public policy the same protection would, no doubt, be given to anything in the nature of an act of State, *e.g.*, to every communication relating to State matters made by one minister to another or to the Crown (*s*).

B. The following are the cases of qualified privilege, in which proof of malice enables plaintiff to succeed :—

1. "When the circumstances are such as to cast on the defendant the duty of making the communication to a third party" (*t*).
2. "When the defendant has an interest in making the communication to the

(*p*) *Marks* v. *Frogley* (1898) 1 Q. B. 888.

(*q*) *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744; 45 L. J. Q. B. 8, Cockburn, C.J., dissentiente.

(*r*) *Dawkins* v. *Lord Paulet* (1869), L. R. 5 Q. B. 94; 39 L. J. Q. B. 53.

(*s*) This passage, which appears in the Author's "Principles and Practice of the Law of Libel and Slander," 4th ed. p. 124, was cited with approval by Lord Esher, M.R., and Kay, L.J., in *Chatterton* v. *Secretary of State for India in Council* (1895) 2 Q. B. at pp. 191, 194.

(*t*) Per Lopes, L.J., in *Pullman* v. *Hill & Co.* (1891) 1 Q. B. p. 530.

third person, and the third person has a corresponding interest in receiving it" (*u*).

3. Fair and impartial reports of proceedings—(a) in Parliament; or (b) in any court of justice; or (c) in any public meeting, or meeting of certain public bodies and persons specified in sect. 4 of the Law of Libel Amendment Act, 1888.

"The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion" (*x*). Further, it must be remembered, "as was pointed out by Lindley, L.J., in *Stuart* v. *Bell* (*y*), the question whether the occasion is privileged does not depend upon the defendant's belief that it is so" (*z*).

1. **Duty.**—(a) *Communications made in pursuance of a duty owed to society.*—"The rule is this, that

(*u*) Per Lopes, L.J., in *Pullman* v. *Hill & Co.* (1891) 1 Q. B. at p. 530.

(*x*) Per Lord Esher, M.R., in *Hebditch* v. *McIlwaine* (1894) 2 Q. B. at. p. 58.

(*y*) (1891) 2 Q. B. 341.

(*z*) Per A. L. Smith, L.J., in *Hebditch* v. *McIlwaine* (1894) 2 Q. B. at p. 63.

where the circumstances are such as to cast on the defendant the duty of making the communication to a third party, the occasion is privileged" (*a*). "The duty may be legal, social, or moral" (*b*). "Where," says Blackburn, J. (*c*), "a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then, if he *bonâ fide* and without malice does tell them, it is a privileged communication." Thus, where a person answers an inquiry *bonâ fide* and without malice, the answer is a privileged communication, and this is true of every answer to a confidential inquiry; for in the language of Grove, J., in *Robshaw* v. *Smith* (*d*), "everyone owes it as a duty to his fellow men to state what he knows about a person when inquiry is made," and everything pertinent to the subject of inquiry the which subsequently passes between the parties is also privileged (*e*).

"The belief of the defendant that there was a duty to make the communication is irrelevant to the question whether the occasion is privileged" (*f*).

(*a*) Per Lopes, L.J., in *Pullman* v. *Hill & Co.* (1891) 1 Q. B. at p. 530.

(*b*) Per Lopes, L.J., in *Stuart* v. *Bell* (1891) 2 Q. B. at p. 353.

(*c*) *Davies* v. *Snead* (1870), L. R. 5 Q. B. 611.

(*d*) (1878), 38 L. T. 43.

(*e*) *Beatson* v. *Skene* (1860), 29 L. J. Ex. 430. But this rule does not apply to trade protection societies: *Macintosh* v. *Dun* (1908) A. C. 390.

(*f*) Per Lord Esher, M.R., in *Hebditch* v. *McIlwaine* (1894) 2 Q. B. at p. 103.

Even if volunteered, the communication may fall within the protection of the general rule laid down above; for "it is not necessary in all cases that the information should be given in answer to an inquiry" (*g*), though under such circumstances it will, of course, be more difficult for the defendant to satisfy a jury that in making the communication he was not actuated by malice (*h*).

Under this head of privilege come communications as to the characters of clerks and servants. No one is obliged to give his clerk or servant a character (*i*); but if he does so he must do it honestly, and then, even if it be in fact untrue, the master will be protected (*k*). If a master after giving a servant a character discovers facts unfavourable to him, and communicates these to the person to whom he had previously given such character, such communication is privileged (*l*); and if a master discharges one of his servants and tells the others why he has done so, such communication will also be privileged (*m*). Thus, where

(*g*) Per Jessel, M.R., in *Waller* v. *Loch* (1881), 7 Q. B. D. at p. 621.

(*h*) Per Littledale, J., in *Pattison* v. *Jones* (1828), 8 B. & C. at p. 586.

(*i*) *Carrol* v. *Bird* (1800), 3 Esp. 201; 6 R. R. 824.

(*k*) *Rogers* v. *Clifton* (1803), 3 B. & P. 587; *Murdoch* v. *Funduklian* (1886), 2 Times L. R. 614.

(*l*) *Gardner* v. *Slade* (1849), 18 L. J. Q. B. 334.

(*m*) *Somerville* v. *Hawkins* (1850), 10 C. B. 590; 20 L. J. C. P. 131.

the plaintiff was a guard in the service of the defendants, a railway company, and the defendants dismissed him on the ground that he had been guilty of gross neglect of duty and published his name in a printed monthly circular addressed to their servants, stating in it that he had been dismissed, and the ground of his dismissal, it was held that such circular was privileged if published *bonâ fide* and without malice towards the plaintiff (*n*).

A similar protection is extended to all communications, made *bonâ fide* and on reasonable grounds, to a father respecting his child (*o*), or to a master as to his servant (*p*); by one friend to another as to a doctor (*q*), or tradesman (*r*), or an intending suitor (*s*); by a servant to his master (*t*); by an undermaster to the headmaster (*u*); by an official in the army or navy or any government office to his superior (*x*); by a master concerning his servant or a child entrusted to his charge, to the parent

(*n*) *Hunt* v. *G. N. Ry. Co.* (1891) 1 Q. B. 189.
(*o*) Per Erle, C.J., in *Whiteley* v. *Adams* (1863), 33 L. J. C. P. p. 95.
(*p*) *Masters* v. *Burgess* (1887), 3 Times L. R. 96.
(*q*) *Dixon* v. *Smith* (1860), 29 L. J. Ex. 125.
(*r*) *Storey* v. *Challands* (1837), 8 C. & P. 234.
(*s*) 15 C. B. N. S. 410, 411.
(*t*) *Scarl* v. *Dixon* (1864), 4 F. & F. 250.
(*u*) *Hume* v. *Marshall* (1878), 42 J. P. 136.
(*x*) *Stace* v. *Griffith* (1869), L. R. 2 P. C. 420.

or guardian of such servant or child (*y*); and by a solicitor to his client (*z*), even though he is not at the time engaged in the conduct of any legal proceedings on his behalf (*a*).

"If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business" (*b*). Therefore where in the ordinary course of business of a company or mercantile firm (*c*) it is reasonably necessary that a document should be copied into a copy letter-book or telegram-book, the privilege is not lost.

On the same ground, "if a communication made by a solicitor to a third party (*e.g.*, his clerk) is reasonably necessary and usual in the discharge of his duty to his client and in the interest of his client, the occasion is privileged" (*d*).

In all the above cases it must, however, be remembered that the privilege does not extend to

(*y*) *Fowler and Wife* v. *Homer* (1812), 3 Camp. 294; 13 R. R. 807.

(*z*) *Wright* v. *Woodgate* (1835), 2 C. M. & R. 573.

(*a*) *Davis* v. *Reeves* (1855), 5 Ir. R. C. L. 79.

(*b*) Per Fletcher Moulton, L.J., in *Edmondson* v. *Birch* (1907) 1 K. B. at p. 382.

(*c*) *Edmondson* v. *Birch* (1907) 1 K. B. 371 (C. A.); and see particularly the observations of Cozens-Hardy, L.J., at p. 382.

(*d*) Per Lopes, L.J., in *Boxsius* v. *Goblet Frères* (1894) 1 Q. B. at p. 846

expressions wholly unwarranted by the circumstances of the case (*e*), nor to unnecessary publication (*f*). On the other hand, the fact that there were other persons present than those to whom the defendant was under a duty to make the statement in question will not necessarily destroy the privilege. If their presence was accidental or could not be prevented by the defendant, the privilege will not be lost. Thus, in *Pittard* v. *Oliver*(*g*), it was held that the privilege which would have attached to defamatory statements made at a meeting of a board of guardians, of which the defendant was a member, was not destroyed by the presence of reporters. "Was the defendant's duty to the guardians and to the ratepayers generally taken away by the presence of these other persons who were not called in by him, and over whose presence he could exercise no control? The question answers itself; the presence of these persons left his duty to discuss the matters untouched; the occasion was privileged for the performance of that duty, and the privilege was not taken away by the presence of such people under such circumstances" (*h*).

(b) *Communications made in self-defence.*—Thus,

(*e*) *Warren* v. *Warren* (1834), 1 C. M. & R. 251.
(*f*) *Browne* v. *Croome* (1817), 2 Stark. 292; 19 R. R. 727.
(*g*) (1891) 1 Q. B. 474; *Mapey* v. *Baker* (1909), 73 J. P. 289.
(*h*) Per Lord Esher, M.R., in *Pittard* v. *Oliver* (1891) 1 Q. B. at p. 478.

if the plaintiff had previously attacked the defendant, any statement made by the latter which is necessary in order to protect himself, and which is in any way relevant to the accusations made against him by the plaintiff, is privileged; *e.g.*, where the policy-holder of an insurance company published a pamphlet charging the directors with fraud, and the directors published a pamphlet in reply defending themselves and accusing the plaintiff of making false and calumnious accusations, and further stating that he had upon a certain occasion made statements on oath in direct contradiction of statements which he had previously made in writing, it was left to the jury to say whether the countercharges made by the defendants were made *bonâ fide*, and whether they went beyond the occasion, and the jury found for the defendants (*i*). So, too, where the plaintiff has previously attacked the defendant in the newspapers (*k*), or in public (*l*), and the latter retaliates by publishing in the papers in self-defence a statement of the case from his point of view, and in so doing makes defamatory statements concerning the plaintiff, such statement is privileged if made *bonâ fide*.

(*i*) *Koenig* v. *Ritchie* (1862), 3 F. & F. 413; *Reg.* v. *Veley* (1865), 4 F. & F. 1117.

(*k*) *Coward* v. *Wellington* (1836), 7 C. & P. 531.

(*l*) *Laughton* v. *Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495.

The privilege may be lost if the extent of publication is excessive—*e.g.*, in a matter of purely local or private importance it cannot be necessary to write to the *Times*, or to advertise. In such a case, the extent given to the announcement is evidence of malice to go to the jury (*m*).

2. Interest.

"If the communication was of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them,—when those two things co-exist, the occasion is a privileged one" (*n*). **This common interest may be in respect of family affairs**—*e.g.*, communications made *bonâ fide* to a lady by her son-in-law, as to the character of her intended husband (*o*), **or it may be in respect of money matters**—*e.g.*, a letter written by a ratepayer affecting the character of the parish constable, to be read at a parish meeting at which the accounts of the parish were to be considered (*p*), **or in respect of a particular profession or calling**—*e.g.*, anything said by a life governor of a school to its steward

(*m*) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741.

(*n*) Per Lord Esher, M.R., in *Hunt* v. *G. N. Ry. Co.* (1891) 2 Q. B. at p. 191.

(*o*) *Todd* v. *Hawkins* (1837), 8 C. & P. 88.

(*p*) *Spencer* v. *Amerton* (1835), 1 Moo. & R. 470.

concerning one of the tradesmen employed to supply the school (*q*), or in respect of any right or duty recognised by the law—*e.g.*, a letter written by a creditor who had been appointed trustee in liquidation of a debtor's estate to another creditor (*r*), or by a solicitor writing on behalf of his client, and in the ordinary course of his duty, to a third party (*s*).

But in all these cases the privilege will be lost if the statement is made to an unnecessarily large number of persons (*t*), or contains exaggerated and unwarrantable expressions (*u*), or extends to matters outside those in which the plaintiff and defendant have a common interest (*x*).

3. Fair reports of proceedings (A) in Courts of Justice; (B) in Parliament; (C) in public meetings.

(A) **Reports of proceedings in Courts of Justice,** in order to be privileged, must be—

a. *Fair and accurate :*

The report must be "substantially a fair account of what took place" (*y*) in court.

(*q*) *Humphreys* v. *Stilwell* (1862), 2 F. & F. 590.

(*r*) *Spill* v. *Maule* (1869), L. R. 4 Ex. 232 ; 38 L. J. Ex. 138.

(*s*) *Quartz Hill Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. 509 ; *Baker* v. *Carrick* (1894) 1 Q. B. 838.

(*t*) *Duncombe* v. *Daniell* (1837), 8 C. & P. 222.

(*u*) *Bromage* v. *Prosser* (1825), 4 B. & C. 247 ; 28 R. R. 241.

(*x*) *Warren* v. *Warren* (1834), 1 C. M. & R. 250.

(*y*) Per Lord Campbell, C.J., in *Andrews* v. *Chapman* (1853),

It is immaterial by whom it was published. In the words of Brett, L.J., the privilege is the same "for a private individual as for a public newspaper" (*z*). "There is no special privilege for newspapers" (*a*). A report of the judgment alone, without any report of the evidence, is privileged (*b*).

Formerly, reports of *ex parte* proceedings were not privileged. *Currie* v. *Walter* (*c*) and *Lewis* v. *Levy* (*d*) decided that such reports are privileged if the *ex parte* proceedings result in the discharge by the magistrates of the party charged; it must now, however, be considered settled by *Usill* v. *Hales* (*e*) and *Kimber* v. *The Press Association* (*f*) that all reports of ex parte proceedings are privileged. In

3 C. & K. at p. 289; cf. *Furniss* v. *Cambridge Daily News* (1907), 23 T. L. R. 705 (C. A.); *Hope* v. *Leng* (1907), 23 T. L. R. 243 (C. A.). The omission of the result may be most material: *Pope* v. *Outram* (1909) S. C. 230.

(*z*) *Milissich* v. *Lloyds* (1877), 46 L. J. C. P. 404.

(*a*) Per Day, J., in *Rumney* v. *Walter* (1892), 8 Times L. R. at p. 262.

(*b*) Per Fry, L.J., in *Macdougall* v. *Knight* (1890), 25 Q. B. D. at p. 11; but see the observations of Lord Halsbury, L.C., in *Macdougall* v. *Knight* (1889), 14 A. C. at pp. 200—203.

(*c*) (1796), 1 B. & P. 525; 4 R. R. 717.

(*d*) (1858), 27 L. J. Q. B. 287.

(*e*) (1878), 3 C. P. D. 319.

(*f*) (1893) 1 Q. B. 65 (C. A.).

the former case an action was brought against the proprietors of the *Daily News*, the *Standard*, and the *Morning Advertiser* for publishing a report of an *ex parte* application by three engineers to a magistrate for criminal process against the plaintiff, stating that the plaintiff had employed, but not fully paid, them. It was held that such report of *ex parte* proceedings was privileged, as being fair and accurate.

b. *Not prohibited by order of the court:*

c. *Not blasphemous, seditious, nor immoral:*

Even if the report satisfies the above conditions, yet it will not be privileged if plaintiff proves that defendant was actuated by malice (*g*).

Where judicial proceedings last more than one day, and publication is not expressly forbidden by the court, a report published daily is privileged, if fair and accurate, *but* no comment is allowed until the proceedings terminate (*h*).

(B) Reports of Parliamentary proceedings. Every

(*g*) *Stevens* v. *Sampson* (1879), 5 Ex. D. 53. As to a possible exception to this rule, see p. 156, *supra*.

(*h*) *Lewis* v. *Levy* (1858), 27 L. J. Q. B. 287; *Rex* v. *Davies* (1906) 1 K. B. 32.

fair and accurate report of any proceeding in either House of Parliament, or in any committee thereof, is privileged. The analogy between such reports and those of legal proceedings is complete. Whatever would deprive a report of a trial of immunity will equally deprive a report of parliamentary proceedings of all privilege.

The above rule was for a long time doubtful; it is now clearly and satisfactorily settled by *Wason* v. *Walter* (*i*), in which case the plaintiff sued the proprietor of the *Times* for publishing a report of a debate in the House of Lords commenting severely on plaintiff's conduct in procuring the presentation of a petition to the House of Lords, which charged a high judicial officer with misconduct; and it was held that the report was privileged.

As has been pointed out, the privilege attaching to fair and accurate reports may be rebutted by proof of actual malice. In these cases there are two distinct questions for the jury—

1. Is the report fair and accurate? If so,

(*i*) (1868), 4 Q. B. D. 73.

it is *primâ facie* privileged; if not, verdict for plaintiff. If this question is answered in the affirmative,

2. Was the report, though fair and accurate, published maliciously?

(C) By the Law of Libel Amendment Act, 1888, s. 4, a fair and accurate report in a newspaper of the proceedings of a public meeting, or of any meeting of a vestry, town council, school board, or other public bodies or persons specified in such Act, is privileged,

provided that—

(1) Such report is fair and accurate;

(2) The matter complained of is not blasphemous or indecent; and

(3) The matter complained of is of public concern, or the publication thereof is for the public benefit. This privilege may be rebutted by proof (1) that the report was published or made maliciously; or (2) that the defendant has, after request, refused or neglected to insert in his newspaper a reasonable letter or statement by way of contradiction or explanation of such report (*k*).

(*k*) For further information on this subject, see the Author's Principles and Practice of the Law of Libel and Slander," 4th ed. pp. 141—152, Butterworth & Co., London, 1908.

Unless, therefore, a report is—

(a) Of proceedings in a court of justice; or

(b) Of parliamentary proceedings; or

(c) Within the protection of sect. 4 of the Law of Libel Amendment Act, 1888,

it is no defence to plead that the report is a correct and faithful report of what actually took place. The defendant must rely on—

(1) The matter published being strictly true, and (if defendant in a criminal case) for the public benefit; or

(2) The words used being a fair comment on a matter of public interest.

IV. Apology.

This statutory defence is only available in an action for a libel contained in a *public newspaper or other periodical publication* (*l*); and the defendant must prove (1) that the libel was published without actual malice and without gross negligence; and (2) that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or publication a full apology for such libel.

Moreover, there must be a payment of money into court by way of amends at the time the plea is

(*l*) 6 & 7 Vict. c. 96 (Lord Campbell's Libel Act), s. 2.

filed (*m*), and therefore, having regard to Ord. XXII., Rule 1, no other defence denying liability can be pleaded together with such plea.

Injunctions.—The Court has jurisdiction in an action of libel or slander to restrain by injunction either before or at the trial any further publication of such libel or slander (*n*), but in the former case the jurisdiction will be exercised with great caution (*o*).

In order to obtain an interim injunction the plaintiff must make his application promptly (*p*); he must also prove that the defendant intends to continue the publication complained of (*q*), and further, that unless at once restrained such statements will cause immediate (*r*) and irreparable (*s*) injury to person or property.

There have been several important cases on this branch of the law, and "in a judgment of Lord Esher, M.R., which underlies every subsequent

(*m*) 8 & 9 Vict. c. 75, s. 2.

(*n*) *Saxby* v. *Easterbrook* (1878), 3 C. P. D. 339.

(*o*) *Quartz Hill Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. 501.

(*p*) *Monson* v. *Tussauds, Limited* (1894) 1 Q. B. 671.

(*q*) Per Jessel, M.R., in *Quartz Hill Gold Mining Co.* v. *Beall* (1882), 20 Ch. D. at pp. 508, 509.

(*r*) *Salomons* v. *Knight* (1891) 2 Ch. 294.

(*s*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1885), 15 Q. B. D. 467.

decision on the subject" (*t*), the rule of practice is thus stated: "To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel before the jury decides whether it is a libel or not. Therefore the jurisdiction is of a delicate nature. It ought only to be exercised in the clearest cases where any jury would say that the matter complained of is libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable. The court must also be satisfied that in all probability the alleged libel was untrue, and, if written on a privileged occasion, that there was malice on the part of the defendant. It follows from those three rules that the court can only on the rarest occasions exercise the jurisdiction" (*u*). Thus, in *Collard* v. *Marshall* (*x*) an interlocutury injunction was granted to restrain the defendant, who was the secretary of a trade union, from publishing a placard stating that there was a strike now on at the plaintiff's works; that

(*t*) Per Lopes, L.J., in *Monson* v. *Tussauds*, *Limited* (1894) 1 Q. B. at p. 693.

(*u*) Per Lord Esher, M.R., in *Coulson* v. *Coulson* (1887), 3 Times L. R. at p. 846; approved and in part adopted by the full Court of Appeal in *Bonnard* v. *Perryman* (1891) 2 Ch. at p. 284; and, again, per Lopes, L.J., and Davey, L.J., in *Monson* v. *Tussauds*, *Limited* (1894) 1 Q. B. at pp. 693, 696, 697.

(*x*) (1892), 8 Times L. R. 846; cf. *Corelli* v. *Wall* (1906), 22 T. L. R. 532.

the sweating system was practised, and the polishing badly done there—these statements being held to be untrue, and the defendant not suggesting that he could produce further evidence in support of them.

The Court has also a general jurisdiction to restrain by injunction the publication of any matter which tends to prejudice the administration of justice, provided that application for such relief is made without delay. Thus the publication of any comments on a pending trial will be restrained, whether such comments amount to a libel (*y*) or not (*z*).

Slander of title.—Strictly speaking, this wrong has no place in a chapter on libel and slander, but for the sake of convenience it seems desirable to deal shortly with the subject. Slander of title consists of a false, malicious statement of fact in writing, printing, or by word of mouth injurious to any person's title to property, and causing special damage to such person. For the publication of such statement an action will lie. In such a case there is no wrong to the reputation—no defamation —and the action is not for libel or slander, but

(*y*) *Coleman* v. *West Hartlepool Harbour, &c. Co.* (1860), 8 W. R. 734.

(*z*) *Mackett* v. *Commissioners of Herne Bay* (1876), 24 W. R. 845.

"an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title" (*a*). In order to succeed the plaintiff must prove :—

(1) That the statement is false ;

(2) That it is malicious in fact ;

(3) That it has caused him special damage (*b*).

It is also actionable to publish maliciously, or without lawful occasion, a false statement disparaging the goods of any person, and causing such person special damage (*c*). The malice spoken of above is want of good faith, or any corrupt or wrong motive.

There is a great difference between puffing one's own goods and disparaging those of another trader. A mere puff which praises one's own goods confers no right of action on a rival trader, but if one goes further and decries his goods or property and causes him damage, then an action lies. Thus to say one's goods are equal to or better than those of

(*a*) Per Tindal, C.J., in *Malachy* v. *Soper* (1835), 3 Bing. N. C. 371. Per Lord Davey in *Royal Baking Powder Co.* v. *Wright* (1900), 18 Reports of Patent Cases at p. 99 ; see also *Barrett* v. *Associated Newspapers* (1907), 23 T. L. R. 666.

(*b*) *Lyne* v. *Nichols* (1906), 23 T. L. R. 86.

(*c*) *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (1874), L. R. 9 Ex. 218, 222 ; *Ratcliffe* v. *Evans* (1892) 2 Q. B. at p. 524 ; *White* v. *Mellin* (1895) A. C. 154 ; *Hubbuck & Sons, Limited* v. *Wilkinson, Heywood & Clark, Limited* (1899) 1 Q. B. 86.

another gives no cause of action (*d*). An untrue statement by a newspaper as to its circulation may amount to a statement disparaging a rival (*e*).

(*d*) *Hubbuck* v. *Wilkinson* (1899) 1 Q. B. 86; cf. *Alcott* v. *Millar's Karri, &c. Co.* (1904), 21 T. L. R. 30.

(*e*) *Lyne* v. *Nichols* (1906), 23 T. L. R. 86; *Concaris* v. *Duncan* (1909) W. N. 51.

CHAPTER VIII.

OF WRONGS TO THE PERSON.

A.—Assault and Battery.
B.—False Imprisonment.
C.—Malicious Prosecution.
D.—Malicious Arrest.

A.—An assault is the unlawful laying of hands on another person, or an attempt or offer to do a corporal hurt to another, coupled with an apparent present ability and intention to do the act. No mere words can in any case amount to an assault (*a*).

A battery is the actual striking of another person, or touching him in a rude, angry, revengeful, or insolent manner. "The least touching of another in anger is a battery" (*b*).

"Such acts as are reasonably necessary for the common intercourse of life are not assaults or

(*a*) Stephen's Digest of the Criminal Law, 6th ed. p. 202.
(*b*) Per Holt, C.J., in *Coles* v. *Turner* (1705), 6 Mod. 149.

batteries, if they are done for the purpose of such intercourse only, and with no greater force than the occasion requires" (*c*).

Mayhem is assault and battery of such an aggravated character as to amount to an actual wounding of the person; or, according to an old definition, "The violently depriving another of the use of such of his members as may render him the less able in fighting to defend himself or to annoy his adversary."

Assault and battery are justifiable—

(1) In defence of person or property (*d*). The force used must not, however, be more than is necessary under the circumstances. Under the first of these heads a man may justify himself on the ground of defending his wife, child, or probably even his friend.

(2) By reason of defendant's peculiar position, *e.g.*, a father may chastise his child, or a schoolmaster his boys, or a captain the sailors on board his ship; but the chastisement must not be excessive or unreasonable.

(3) By leave and licence of the party injured.

(4) In the preservation of the public peace, if

(*c*) Stephen's Dig. Cr. Law, 6th ed. p. 203.

(*d*) See *Blades* v. *Higgs* (1861), 30 L. J. C. P. 347; and pp. 31, 67, 72, *supra*.

committed during the continuance of the affray (*e*), and with no more force than is necessary.

Defence under 24 & 25 Vict. c. 100, ss. 42—45.—Where an assault is complained of before justices, and (1) the punishment imposed by the justices is suffered, or (2) after an actual hearing on the merits (*f*), they give a certificate of acquittal on the ground (a) that the offence is deemed not proved, or (b) that it was "justified, or so trifling as not to merit any punishment," then in the above cases there is immunity from "all further or other proceedings against defendant, civil or criminal, for the same cause." In *Reg.* v. *Morris* (*g*) it was held that these words mean subsequent proceedings for an assault, and that they are not meant to cover subsequent proceedings for the act constituting the assault. Thus, in the case cited, it was held that if death followed an assault, for which the offender had been punished, he might, nevertheless, be indicted for manslaughter; and in the later case of *Masper* v. *Brown* (*h*) it was held that a man who had been fined for an assault on a married woman could not be subsequently sued by her husband for

(*e*) *Noden* v. *Johnson* (1850), 16 Q. B. 218.
(*f*) *Reed* v. *Nutt* (1890), 24 Q. B. D. 669; 59 L. J. Q. B. 311.
(*g*) (1867), L. R. 1 C. C. R. 90.
(*h*) (1876), 1 C. P. D. 97.

the damage he had sustained by the loss of his wife's services. In *Dyer* v. *Munday* (*i*) it was held that a master was not released from liability for his servant's assault by reason of the fact that the servant had been convicted and suffered the punishment.

The granting of the certificate by the justices may, if it be refused, be compelled by mandamus.

B.—False imprisonment is some unlawful detention of the person, either (1) actual, *e.g.*, laying hands upon a person; or (2) constructive, *e.g.*, by an officer telling anyone he is wanted and making him accompany him, as was done by a bailiff in *Grainger* v. *Hill* (*k*). There must be **restraint** or **show of authority,** but not necessarily incarceration. But the restraint must be total. A mere partial restraint is not sufficient. Thus, in *Bird* v. *Jones* (*l*) it was held that no imprisonment was committed by two policemen who merely hindered defendant from going on a portion of a public footway on a bridge which was appropriated by seats to view a regatta. The plaintiff need only prove the detention or imprisonment; the defendant must then justify what he did, which he can do—

I. If he acted under legal warrant.

(*i*) (1895) 1 Q. B. 472.
(*k*) (1838), 4 Bing. N. C. 212.
(*l*) (1845), 7 Q. B. 742.

II. If he acted without warrant:—

1. If a constable (*m*) he may arrest—
   (1) Anyone whom he suspects on reasonable grounds of having committed a felony (*n*).
   (2) To prevent a breach of the peace, or whenever a breach has been committed in his presence.
   (3) By statutory authority, *e.g.*, when he finds anyone committing an indictable offence by night or malicious injury to property.
2. If a private person, he may arrest—
   (1) Anyone whom he suspects on reasonable grounds of having committed a felony, **provided that a felony has actually been committed** (*o*).
   (2) To stay a breach of the peace or for treason.
   (3) By statutory authority, *e.g.*, under the Vagrancy Act (5 Geo. 4, c. 83), for indecent exposure, street gaming, &c.
   (4) Anyone for whom he has become bail

(*m*) It would seem that a constable employed by a railway company under statutory powers can only arrest, off the company's premises, in respect of an offence committed on those premises *King* v. *Metropolitan Dist. Ry. Co.* (1908), 99 L. T. 278.

(*n*) Archbold's Criminal Pleading and Evidence, 23rd ed., pp. 893, 894; and see *Lambert* v. *G. E. Ry. Co.* (1909) 2 K. B. 776.

(*o*) *Ibid.* p. 894.

in order to give him up in his (the bailor's) discharge (*p*).

3. **By reason of his position**, *e.g.*, naval and military officers may detain their subordinates, a master his apprentice, or a father his child.

A person who allows passengers on to his premises does not bind himself to provide a free exit, and consequently can lawfully decline to allow anyone, who does not pay his charge, to leave them (*q*).

C.—**Malicious prosecution** is a malicious institution against another of criminal or bankruptcy proceedings without reasonable and probable cause. Plaintiff must prove four things—

1. **That defendant preferred a charge of the nature indicated (in above definition) against him before a judicial officer.**

There must be the active preferring of a charge; therefore merely signing a charge sheet is not enough (*r*).

2. **That defendant acted maliciously.** The malice here spoken of is "malice in fact (*malus animus*), indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improper

(*p*) *Ex parte Lyne* (1822), 3 Stark. 132; 23 R. R. 762.
(*q*) *Robinson* v. *Balmain New Ferry Co.* (1910) A. C. 295.
(*r*) *Sewell* v. *N. T. Co.* (1907) 1 K. B. 557.

motives, though these may be wholly unconnected with any uncharitable feeling towards anybody" (*s*). As was pointed out by Bowen, L.J., in *Abrath* v. *N. E. Rail. Co.* (*t*), the plaintiff in an action of this kind must prove that the defendant acted "from an indirect and improper motive, and not in furtherance of justice." In the words of Alderson, B. (*u*), "any motive, other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way." The existence of malice is purely a question of fact for the jury. Absence of reasonable and probable cause is not of itself sufficient evidence of malice (*x*); nor is the mere fact that the plaintiff was acquitted (*y*).

3. **That the defendant acted without reasonable and probable cause.** The jury find the facts on which the question of reasonable and probable cause depends, and the judge then

(*s*) Per Hawkins, J., in *Hicks* v. *Faulkner* (1882), 8 Q. B. D. at p. 175.

(*t*) (1883), 11 App. Cas. at p. 247.

(*u*) *Stevens* v. *Midland Counties Ry. Co.* (1854), 10 Ex. 356.

(*x*) *Brown* v. *Hawkes* (1891) 2 Q. B. 718. See particularly the observations of Bowen, L.J., at pp. 727–728.

(*y*) *Corea* v. *Peiris* (1909) A. C. 549.

decides whether the facts so found constitute reasonable and probable cause (*z*).

4. **That the proceedings terminated in plaintiff's favour**; but this need not be proved if the proceedings are in their nature incapable of terminating in the plaintiff's favour, *e.g.*, the malicious exhibition of articles of the peace (*a*).

It has been held that an action for malicious prosecution will lie against a corporation or limited company (*b*).

Distinction between false imprisonment and malicious prosecution.

A person who sets the criminal law in motion without making its act his own may be liable for malicious prosecution, but he cannot be sued for false imprisonment.

The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody

(*z*) *Perryman* v. *Lister* (1868), L. R. 4 H. L. 521; *Cox* v. *English Bank* (1905) A. C. 168.

(*a*) *Steward* v. *Gromett* (1859), 7 C. B. N. S. 191.

(*b*) *Edwards* v. *Midland Ry. Co.* (1880), 6 Q. B. D. 287; *Kent* v. *Courage & Co.* (1891), 55 J. P. 264; 7 Times L. R. 50; *Cornford* v. *Carlton Bank, Limited* (1899) 1 Q. B. 392; *Rayson* v. *South London Tramways Co.* (1893) 2 Q. B. 304; *Citizens' Life Assurance Co.* v. *Brown* (1904) A. C. 423.

and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a **ministerial** officer in motion, but a **judicial** officer. "The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment" (*c*). Thus the question is, does defendant set a **ministerial** or a **judicial** officer in motion? If the former, he may be liable for false imprisonment; if the latter, for malicious prosecution.

In an action for false imprisonment the onus of proving reasonable and probable cause lies on the defendant; in an action for malicious prosecution the onus lies upon the plaintiff to prove that the defendant acted without reasonable and probable cause. The reason for this distinction is that any interference with a man's personal liberty is *primâ facie* wrongful, and therefore has to be justified; but anyone is *primâ facie* entitled to set the criminal law in motion (*d*). "Imprisonment is *primâ facie* a tort; prosecution is not so in itself" (*e*).

(*c*) Per Willes, J., in *Austin* v. *Dowling* (1870), L. R. 5 C. P. at p. 540.

(*d*) "Cases illustrating the Principles of the Law of Torts," by Radcliffe and Miles, Clarendon Press, 1904.

(*e*) Per Alderson, B., in *Panton* v. *Williams* (1841), 2 Q. B. at p. 181. See also the observations of Hawkins, J., in *Hicks* v. *Faulkner* (1882), 8 Q. B. D. at p. 170.

D.—**Malicious arrest is wilfully putting the law in motion to effect the arrest under civil process of another without cause**, and anyone committing this offence, *i.e.*, deliberately obtaining the arrest of another by a false statement or suppression, renders himself liable to an action for damages. The malice here spoken of is malice in law.

CHAPTER IX.

OF WRONGS ARISING FROM FRAUD (*a*).

Fraud is a false representation of fact made with a knowledge of its falsehood, or without belief in its truth, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party. No action lies unless the plaintiff has been induced to act upon such false representation and actual damage has resulted—such damage being the natural and probable consequence of plaintiff's action on faith of defendant's statement.

The leading case on this subject is *Derry* v. *Peek* (*b*), which came before the House of Lords in 1889. "*Derry* v. *Peek*," said Bowen, L.J. (*c*), "decided . . . that you cannot succeed in an action of fraud without proving that the defendant was

(*a*) I am under considerable obligation to Sir William Anson's Law of Contract in respect of the first part of this chapter, and the student should carefully read pp. 187–198 of the 12th edition of that learned author's work.

(*b*) 14 App. Cas. at p. 374; and see *Pearson* v. *Dublin Corporation* (1907) A. C. 351.

(*c*) In *Le Lièvre* v. *Gould* (1893) 1 Q. B. at p. 499; see also *Refuge Assce. Co.* v. *Kettlewell* (1908) 1 K. B. 545; (1909) A. C. 243; *Assicurazioni, &c. de Trieste* v. *Empress, &c. Assn.* (1907) 2 K. B. 814.

fraudulent. It is singular that any doubt should ever have been cast on that proposition" (*d*). In his judgment in the House of Lords Lord Herschell thus summarized the law. "I think," said the learned judge, "the authorities establish the following propositions:—First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of

(*d*) This general principle is, however, now subject to the statutory exception introduced by the Directors' Liability Act, 1890, in the year following that in which *Derry* v. *Peek* came before the House of Lords. The material provisions of this Act (now repealed but re-enacted in s. 84 of the Companies (Consolidation) Act, 1908) are set out on pp. 195, 196, *infra*, and render not merely belief, but also reasonable grounds for belief, necessary in the particular case of any prospectus or notice with regard to a company.

it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." It is important, however, to notice a later passage in the same judgment which, as was subsequently pointed out by Lindley, L.J., in the Court of Appeal in *Angus* v. *Clifford* (*e*), "qualifies the former statement in a most material manner." "In my opinion," said Lord Herschell, in the passage referred to (*f*), "making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds." Therefore, as the Court of Appeal decided in *Angus* v. *Clifford* (*g*), there is no fraud for which an action will lie, if the defendant carelessly made a false statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved.

There must be a representation of fact false in itself, or misleading because combined with suppression of truth (*h*).—The active concealment of a material fact is sufficient; thus it was held that an action of

(*e*) (1891) 2 Ch. at p. 465.
(*f*) (1889) 14 App. Cas. at p. 375.
(*g*) (1891) 2 Ch. 449.
(*h*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. at p. 403, per Lord Cairns.

deceit lay where the vendor of a house, knowing of a defect in the wall, plastered it up and papered it over (*i*); so, too, in *Schneider* v. *Heath* (*k*), where a ship was sold "with all faults," and the vendor, knowing of a latent defect, concealed it, and made a fraudulent representation as to its condition.

An action of fraud does not lie for a mere expression of opinion or of intention.—The phrase "worth so much" has been held to be merely an expression of opinion (*l*); "gave so much for it" a representation of fact (*m*). But an action will lie if it can be proved as a fact that the opinion was not held, or that the intention was not entertained. As Bowen, L.J., observed in *Edgington* v. *Fitzmaurice* (*n*), "the state of a man's mind is as much a fact as the state of his digestion."

Non-disclosure when there is no duty to disclose is not fraud.—In *Ward* v. *Hobbs* (*o*), defendant, knowing that his pigs had a contagious disease, sent them to market, contrary to the Contagious Diseases (Animals) Act, 1869. The plaintiff bought them,

(*i*) Cited in *Pickering* v. *Dawson* (1813), 4 Taunt. at p. 785.
(*k*) (1813), 3 Camp. 505; 14 R. R. 825.
(*l*) *Harvey* v. *Young* (1602), 1 Yelv. 20.
(*m*) *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 243; *Aarons Reefs* v. *Twiss* (1896) A. C. 273.
(*n*) (1885), 29 Ch. D. at p. 483.
(*o*) (1878), 4 App. Cas. 14.

there being no representation that they were sound, and one of the conditions of sale providing that the purchaser should take them "with all faults"; the greater number died, having infected other pigs belonging to the plaintiff. Held, no action lay. In *Keates* v. *Lord Cadogan* (*p*), where the defendant let a house to the plaintiff for a term of years (*q*), knowing it to be required for immediate occupation, without disclosing that it was in a ruinous condition, it was held that no action for fraud lay.

It should, however, be remembered that apart from the question of fraud the mere relation of vendor and purchaser imposes on the vendor a duty towards the purchaser of warning him that special care will be requisite if there is some dangerous quality in the goods sold of which he (the vendor) knows, but of which the purchaser cannot be expected to be aware (*r*).

There must be knowledge of falsehood or absence of belief in, or reckless disregard of truth (*s*).—In *Dickson* v. *Reuter's Telegraph Co.* (*t*), defendants,

(*p*) (1851), 10 C. B. 591.

(*q*) As to implied warranty of fitness for habitation if house be let furnished for short period, see *Smith* v. *Marrable* (1843), 11 M. & W. 5; *Wilson* v. *Finch-Hatton* (1877), 2 Ex. D. 336; *Sarson* v. *Roberts* (1895) 2 Q. B. 395.

(*r*) See the observations of Collins, M.R., in *Clarke* v. *Army & Navy, &c. Society* (1903) 1 K. B. at pp. 164, 165.

(*s*) *Reese River Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 79.

(*t*) (1877), 3 C. P. D. 1.

by mistake in transmission of a message, caused the plaintiff to ship large quantities of barley which were not required, and which, owing to a fall in the market, resulted in heavy loss. The defendants were held not liable, the representation not being false to their knowledge.

Nor will an action of deceit lie for a representation which the defendant really and honestly believed to be true.—And it is immaterial whether such belief was held on reasonable grounds or not (*w*), except in so far as absence of reasonable cause may go to show that there was no real belief at all (*x*). If the representation is thought to be true at the time of making it, but is subsequently discovered to be false before the other party has acted upon it, it seems on principle that the defendant would be liable. This, at any rate, was the old rule of equity, which, by reason of the Judicature Acts, now prevails.

But it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff.—In *Polhill* v. *Walter* (*y*), the defendant

(*w*) *Glasier* v. *Rolls* (1889), 42 Ch. D. 436; *Low* v. *Bouverie* (1891) 3 Ch. 82. Notice, however, the provisions of the Companies (Consolidation) Act, 1908, s. 84, pp. 195, 196, *infra*.

(*x*) *Derry* v. *Peek* (1889), 14 App. Cas. 337.

(*y*) (1832), 3 B. & Ad. 114; see also *Peek* v. *Gurney* (1873), L. R. 6 H. L. 409.

accepted a bill of exchange drawn on A., representing that he had A.'s authority to do so, and honestly believing that the acceptance would be sanctioned and the bill met by A. The bill was dishonoured. Held, an action for deceit lay against the defendant by an indorsee for value.

In *Leddell* v. *McDougall* (*z*), plaintiff wrote to defendant, asking if defendant could recommend T. as a safe and responsible tenant. Defendant wrote back that "he had much pleasure in replying affirmatively," knowing T. to be a man of no means, who had failed several times in business of the same kind. Held, defendant was liable, even though the letter was written out of pure kindness, and defendant had nothing to gain by making the false representation.

By the **4th section of the Statute of Frauds** (*a*), a promise to answer for the debt, default, or miscarriage of another must be in writing and signed The object of this provision was, however, practically evaded by a number of cases, notably *Pasley* v. *Freeman* (*b*), which were framed in tort instead of in contract.

In consequence of this, **Lord Tenterden's Act, 9 Geo. 4, c. 14,** was passed, requiring every eulogy

(*z*) (1881), 29 W. R. 403.
(*a*) 29 Car. 2, c. 3.
(*b*) (1789), 3 T. R. 51 ; 1 R. R. 634.

of another's conduct, credit, ability, &c., made with the object of inducing trust of such person, to be in writing and signed by the party to be charged therewith, before an action for false representation would lie. According to the better opinion, only statements really going to the assurance of personal credit are within the statute (*c*).

The statement need not be made to the injured party.—Thus, in *Langridge* v. *Levy* (*d*), defendant sold a gun to the father of the plaintiff, for the use of himself and his sons, representing that the gun was made by Nock, and was sound. Plaintiff used the gun, which exploded, injuring his hand. Held, defendant was liable. **The statement must, however, be made with the intention that the plaintiff should act upon it**; and therefore, in *Peek* v. *Gurney* (*e*), directors, who would have been liable to original allottees of shares for false statements in the prospectus of a company, were held not liable to subsequent purchasers of shares which came into the market. **And the injury must be the immediate, not the remote, consequence of the representation thus made** (*f*).

(*c*) Per Parke and Alderson, BB., in *Lyde* v. *Barnard* (1836), 1 M. & W. 101; see also *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 512.

(*d*) (1837), 2 M. & W. 519.

(*e*) (1873), L. R. 6 H. L. 377. This case was distinguished in *Andrews* v. *Mockford* (1896) 1 Q. B. 372.

(*f*) *Peek* v. *Gurney*, *supra*.

Deceit which does not deceive is not fraud.—Thus, in *Horsfall* v. *Thomas* (*g*), the defendant sold a cannon to the plaintiff, having concealed a defect in it. Plaintiff never inspected the cannon, which, owing to the defect, burst on being used. Held, defendant was not liable, as plaintiff never inspected the cannon, and was not deceived by the attempted fraud (*h*).

The fact that the party deceived has the means at hand of finding out the truth is immaterial, if he made no actual independent inquiry (*i*). A mere perfunctory inquiry on the part of the party deceived is not sufficient (*k*). Thus, to escape liability the defendant may prove that the other party (1) knew the truth; or (2) relied wholly on his own investigation; or (3) was not really influenced in his conduct by the defendant's misrepresentation.

The position of **directors and promoters of companies** differs from that of the ordinary defendant in an action of deceit. **By the Companies (Consolidation) Act, 1908, s. 84** (*l*), directors, promoters, and persons who have authorized the issue of any prospectus or

(*g*) (1862), 1 H. & C. 90.

(*h*) See also *Smith* v. *Chadwick* (1882), 20 Ch. D. 27; and *Pasley* v. *Freeman* (1789), 3 T. R. 51; 1 R. R. 634.

(*i*) *Dobell* v. *Stevens* (1825), 3 B. & C. 623; 27 R. R. 441.

(*k*) *Redgrave* v. *Hurd* (1881), 20 Ch. Div. 1.

(*l*) 8 Edw. 7, c. 69.

notice with regard to a company, are liable for loss or damage, caused by an untrue statement therein, to any person who has subscribed for any shares or debentures on the faith of such prospectus or notice, unless it is proved (a) that they not only believed in the statement but had reasonable ground for such belief; or (b) that it was a correct statement of the report or valuation of an engineer, valuer, accountant, or other expert, and even then they will be liable if it be proved that they had no reasonable ground for believing that such person was competent to make such report or valuation; or (c) that such statement was a correct and fair representation of a statement made by an official person, or contained in a public official document.

Misrepresentations made by agents.

The agent himself is personally liable, according to the general rules governing the law as to fraud. The liability of the principal depends on several considerations. The following cases appear on this matter:—

I. **The principal knows the representation to be false.**

(i) **He authorizes the making** of it. In this case, whether the agent knows it to be false or thinks it to be true, the principal is liable.

(ii) **The representation is made by the agent in**

the general course of his employment, but without any specific authorization from the principal. When

(a) **The agent knows it to be false,** the principal is liable (*m*);

(b) **The agent thinks it to be true.** In this case the contract may always be rescinded; but will an action for fraud lie against the principal? The two following distinctions must be remembered:—

(α) *When the principal fraudulently keeps the knowledge from the agent,* he is no doubt liable. This was admitted by all the Barons in *Cornfoot* v. *Fowke* (*n*), and followed in *Ludgater* v. *Love* (*o*), where a father knowingly directed his son to make a false representation about the condition of some sheep.

(β) *When the knowledge is held back by the principal through inadvertence.* In this case it is probable that an action will lie against the principal, though this would be contrary to the decision in *Cornfoot* v. *Fowke* (*n*), where there was a mis-statement by the agent in good faith, and there

(*m*) Per Parke, B., in *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358.
(*n*) (1840), 6 M. & W. 358.
(*o*) (1881), 44 L. T. N. S. 694.

was no suggestion of fraud on the part of the principal, about the condition of a house, and it was held that the plaintiff could not get out of his agreement on the ground of fraud. "I think," said Alderson, B., "it is impossible to sustain a charge of fraud, when neither the principal nor agent has committed any: the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it: and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bonâ fide*." Abinger, C.B., dissented, and it is very probable that this case will be overruled: if, indeed, it is even now law. Many dicta are to be found adverse to this decision, those of Lord St. Leonards in *National Exchange, &c.* v. *Drew* (*p*), and Willes, J., in *Barwick* v. *Eng. Joint Stock Bank* (*q*) being especially worthy of notice.

II. The principal thinks the representation to be true.

(i) He authorizes it to be made. When

(a) The agent knows at the time, or finds out

(*p*) (1855), 3 Macq. at p. 144.
(*q*) (1867), L. R. 2 Ex. 259.

afterwards, that it is false, the principal is liable (*r*) ;

(b) **The agent thinks it to be true**—here the principal is NOT liable.

(ii) **The agent makes the representation in the general course of his employment**, but without any specific authorization. When

(a) **The agent knows it is false**—the principal is liable (*s*). It has been suggested that this liability is limited to the amount of profit made, though in *Swire* v. *Francis* (*t*), the Privy Council held a principal liable who derived no profit at all. It is, however, possible that the limitation suggested would be held applicable if the defendant were a corporation (*u*); though the point was not taken in *Denton* v. *G. N. Rail. Co.* (*x*).

(b) **The agent thinks it to be true**—the principal is NOT liable.

Thus we find that the principal is liable in all

(*r*) (1867), L. R. 2 Ex. 259.

(*s*) *Udell* v. *Atherton* (1861), 7 H. & N. 181 ; and *Barwick* v. *Eng. Joint Stock Bank* (1867), L. R. 2 Ex. 259.

(*t*) (1877), 3 App. Cas. 106.

(*u*) Per Lord Cranworth, in *Western Bank of Scotland* v. *Addie* (1867), L. R. 1 Sc. App., at pp. 166, 167 ; and see per Bowen, L.J., in *British, &c. Co.* v. *Charnwood, &c. Co.* (1887), 18 Q. B. D. at p. 719.

(*x*) (1856), 5 E. & B. 860.

possible cases, except when both he and his agent believe the latter's misrepresentation to be the truth. He cannot evade liability merely by inserting, in the contract with the plaintiff, a clause disclaiming responsibility for representations made by his servants or agents (*y*).

(*y*) *Pearson* v. *Dublin Corporation* (1907) A. C. 351.

CHAPTER X.

OF THE DUTY TO ABSTAIN FROM NEGLIGENCE, AND OF CERTAIN WIDER DUTIES IMPOSED IN SPECIAL CASES.

In all cases of negligence, and, indeed, in all cases of tort, a man is answerable only for such consequences of his wrongful act or omission as, in the ordinary course of affairs, are the natural and probable consequences of such wrongful act or omission (*a*). Thus, in *Scott* v. *Shepherd* (*b*), the defendant threw a lighted squib into a crowded market place, where it was pitched about from hand to hand until it burst, putting out the eye of the plaintiff. The defendant was held liable. The plaintiff must prove that the negligence of the defendant was the effective cause of the injury complained of (*c*). Two cases, one on each side of the line, may be usefully considered. In *Sharp* v. *Powell* (*d*), the defendant's

(*a*) See "The Common Law," by Mr. Justice O. W. Holmes, Lecture III., especially pp. 108 *et seq*.

(*b*) (1773) 2 W. Bl. 892.

(*c*) Per Lord Esher, M.R., in *Englehart* v. *Farrant* (1897) 1 Q. B. at p. 243, and per Vaughan Williams, L.J., in *McDowall* v. *G. W. Ry. Co.* (1903) 2 K. B. at p. 338.

(*d*) (1872), L. R. 7 C. P. 253. Cf. *Sherwell* v. *Alton U. D. C.* (1909), 25 T. L. R. 417.

servants washed a van in the street, in contravention of the Metropolitan Police Act. The water so used would, under ordinary circumstances, have escaped through a grating; but owing to a severe frost the grating had previously become blocked up with ice, and the water, not being able to escape, formed a sheet of ice. Upon this sheet of ice plaintiff's horse slipped and was injured. Held, the defendant was not liable, as the injury was not the natural consequence of his act. But in *Clark* v. *Chambers* (*e*), the defendant wrongfully placed a barrier with spikes across a road, leaving an opening for the purposes of traffic. A third party placed one of these spikes in the roadway. The plaintiff, lawfully passing along the road at night, was injured by this spike. Held, that the defendant was liable, as the injury was the natural and probable consequence of this act.

Damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recovered in an action for negligence if physical injury has been caused to the plaintiff (*f*), but not where such damages are too remote, *e.g.* damages which result from shock caused by seeing a man killed through defendant's negligence (*g*).

(*e*) (1878), 3 Q. B. D. 327.

(*f*) *Dulieu* v. *White & Sons* (1901) 2 K. B. 669. See also *Wilkinson* v. *Downton* (1897) 2 Q. B. 57.

(*g*) *Smith* v. *Johnson*, unreported (see (1901) 2 K. B. at p. 675).

Negligence is the breach of a duty (a) **to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do,** *or* (b) **to abstain from doing something which a prudent and reasonable man would not do** (*h*).

It is important to remember that the defendant will not be legally responsible for not exercising the diligence of an average reasonable man, unless he is so situated that he is under a duty to exercise such diligence towards the person injured (*i*). In the words of Lopes, L.J. (*k*), "there cannot be a liability for negligence unless there is a breach of some duty."

In *Blyth* v. *Birmingham Waterworks Co.* (*l*) it was held that a water company, which observed directions

(*h*) See the judgment of Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.* (1856), 25 L. J. Ex. at p. 213, and of Blackburn, J., in *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175 ; 32 L. J. Ex. 273. For the duties of an occupier of premises, see *ante*, pp. 74–80.

(*i*) See Pollock, 8th ed. pp. 434, 435.

(*k*) In *Lane* v. *Cox* (1897) 1 Q. B. at p. 418. See also *Neuwith* v. *Over-Darwen Society* (1894), 63 L. J. Q. B. 290 ; 70 L. T. 374 ; *Le Lièvre* v. *Gould* (1893) 1 Q. B. 491 ; *Scholfield* v. *Lord Londesborough* (1896) A. C. 514 ; *Cal. Ry. Co.* v. *Mulholland* (1898) A. C. 216 ; *Earl* v. *Lubbock* (1905) 1 K. B. 253 ; *Longman* v. *Bath* (1905) 1 Ch. 646 ; *Colonial Bank* v. *Marshall* (1906) A. C. 559 ; and *De la Bere* v. *Pearson* (1908) 1 K. B. 280 (C. A.) ; *Holland* v. *Manchester and Liverpool, &c. Bank* (1909), 25 T. L. R. 386.

(*l*) (1856), 25 L. J. Ex. 212.

laid down by Act of Parliament in putting down their pipes, was not liable for negligence merely because the precautions which it had taken proved insufficient against the effects of a winter of extreme coldness, such as no ordinary person could have foreseen.

In *Holmes* v. *Mather* (*m*), defendant's horses, driven by defendant's servant, bolted and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. While trying to turn a corner safely, the servant guided them so that, unintended by him, they knocked down and injured plaintiff. Held, defendant was not guilty of negligence. Bramwell, B., is reported to have said (*n*):—"The driver is absolutely free from all blame in the matter. Not only does he not do anything wrong, but he endeavours to do that which is best under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they ran away with the groom and the defendant who is sitting beside him. Now, if the plaintiff, under such circumstances, can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving,

(*m*) (1875), L. R. 10 Ex. 261. See also *Manzoni* v. *Douglas* (1881), 6 Q. B. D. 145; *Stanley* v. *Powell* (1891) 1 Q. B. 86.

(*n*) L. R. 10 Ex. at p. 267; cf. *The Boucau* (1909) P. 163.

was thrown upon her dress, or got into her eye and so injured her. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid."

The fact that the defendant was under contract with a third party does not *per se* give a right of action to a person injured by his breach of it (*o*).

Carriers of passengers are not, like carriers of goods, insurers. Their duty is **to take due care (including in that term the use of skill and foresight)**, and is not a warranty that the carriage is, in every respect, fit for its purpose. In *Readhead* v. *Midland Rail. Co.* (*p*), where the accident was caused by a latent defect in a vehicle, which it was impossible, with the exercise of all due care, caution, and skill, to have discovered, it was held, that the railway company was not liable. Where, however, there is a sale of a chattel for a specific purpose, and therefore an implied warranty that the chattel is reasonably fit for such purpose, the defendant,

(*o*) *Cavalier* v. *Pope* (1906) A. C. 428; *Cameron* v. *Young* (1908) A. C. 176.

(*p*) (1869), L. R. 4 Q. B. 379; as to limitation of liability, see *Smitton* v. *Orient S. N. Co.* (1907), 96 L. T. 846; but see *Clarke* v. *West Ham Corporation*, p. 239, *infra*.

even though not guilty of negligence, is liable for an accident caused by a latent defect in the chattel; thus, in *Randall* v. *Newson* (*q*), plaintiff bought a pole for his carriage from the defendant, a coach-builder. The pole broke in use, and the horses, becoming frightened, were injured. The jury found that the pole was not reasonably fit for the carriage, but that defendant was not negligent. Held, that the defendant was liable.

Province of judge and jury in actions for negligence.—The judge has to say whether, if any facts are established by evidence to the satisfaction of the jury, negligence may be reasonably inferred from those facts; the jurors have to say whether from those facts, when submitted to them, negligence ought to be inferred (*r*).

What must plaintiff prove before the judge can allow the evidence to go to the jury?

(1) Where there is no contract between the parties, plaintiff must prove facts inconsistent with due diligence on defendant's part (*s*). Thus, no negligence can be inferred from the fact

(*q*) (1877), 2 Q. B. D. 102.

(*r*) Per Cairns, L.C., in *Metropolitan Railway Co.* v. *Jackson* (1877), L. R. 3 App. Cas. 197; and see *Toronto Ry. Co.* v. *King* (1908) A. C. 260.

(*s*) And he may support this by evidence that the defendant was, as a rule, lacking in due diligence if that evidence throws light on the matter in issue: *Hales* v. *Kerr* (1908) 2 K. B. 601

of a foot-passenger being knocked down by a carriage where both have an equal right to be, or by a train at a level crossing. "Where the balance is even as to which party is in fault, the one who relies upon the negligence of the other is bound to turn the scale" (*t*).

The mere fact that the defendant sends out a motor bus on a wet day, knowing that it is liable to skid on such days, is not evidence of negligence (*u*).

(2) **Where there is a contract between the parties, and, probably, where there is a personal undertaking without a contract,** plaintiff need only prove such contract or personal undertaking and injury to himself. It is for the defendant to prove that he himself was exercising due care—*e.g.*, a collision between trains under defendant company's control, whereby a passenger is injured, is *primâ facie* proof of negligence, and it is upon defendant to rebut such presumption if he can (*x*). So,

(*t*) Per Erle, C.J., in *Cotton* v. *Wood* (1860), 8 C. B. N. S. 568; 29 L. J. C. P. 333; *Hammack* v. *White* (1862), 11 C. B. N. S. 588; 31 L. J. C. P. 129; *Wakelin* v. *L. & S. W. Ry. Co.* (1886), 12 App. Cas. 41; *Smith* v. *S. E. Ry. Co.* (1895) 1 Q. B. 178.

(*u*) *Wing* v. *London G. O. Co.* (1909) 2 K. B. 652 (C. A.). See also *Walton* v. *Vanguard Motor Bus Co.* (1908), 72 J. P. 505; *Barnes U. D. C.* v. *London G. O. Co.* (1909), 100 L. T. 115; *Parker* v. *London G. O. Co.* (1909), 101 L. T. 623.

(*x*) *Carpue* v. *L. & B. Ry. Co.* (1844), 5 Q. B. 747, 751. Cf. *E. I. R. Co.* v. *Kalidas Mukarjee* (1901) A. C. 396.

too, if the railway servants allow the trains to start with the doors unfastened and the passenger is thereby injured (*y*); but the mere fact that the train overshot the platform is, of itself, no proof of negligence (*z*). Again, if a bailee lose goods entrusted to him it lies on him to disprove negligence (*a*). And even in this class of cases, no action lies unless actual damage is sustained (*b*).

(3) Again, there is a presumption of negligence **when the cause of mischief is apparently under the defendant's control.** In *Scott* v. *London Dock Co.* (*c*), a custom-house officer, being lawfully and by right in certain docks, was knocked down by a bag of sugar which fell from defendant's crane. In *Kearney* v. *L. B. & S. C. Rail. Co.* (*d*), a brick fell from defendant's bridge on plaintiff walking in the road below. In *Byrne* v. *Boadle* (*e*) a bag of flour fell from defendant's warehouse,

(*y*) *Toal* v. *N. B. Ry. Co.* (1908) A. C. 352.

(*z*) *Anthony* v. *M. Ry. Co.* (1909), 100 L. T. 117; and see *Lever* v. *Pontypridd U. D. C.* (1910), 74 J. P. 199.

(*a*) *Phipps* v. *New Claridge's Hotel* (1905), 22 T. L. R. 49; cf. *Williams* v. *Parsons* (1909), 26 T. L. R. 78 (C. A.).

(*b*) *Cole* v. *Christie* (1910), 26 T. L. R. 469.

(*c*) (1865), 34 L. J. Ex. 220; and see *Dominion Natural Gas Co.* v. *Collins* (1909) A. C. 640.

(*d*) (1871), L. R. 6 Q. B. 759.

(*e*) (1863), 2 H. & C. 722. Cf. *Chapronière* v. *Mason* (1905), 21 T. L. R. 633.

in Liverpool, on plaintiff walking in the street below. In all these cases *res ipsa loquitur*, it being held that the mere unexplained fact of the accident happening at all was evidence of negligence.

In actions against local highway authorities and certain other bodies, the plaintiff must prove that the defendant authority not merely omitted to do their duty (nonfeasance) but actually did something inconsistent with their duty (misfeasance) (*f*).

The doctrine of contributory negligence.—Though negligence whereby actual damage is caused is actionable, yet if plaintiff has himself been guilty of such negligence as is in reality the **proximate** or **decisive** cause of the injury complained of, **and but for which such injury would not have happened,** he cannot recover. Not every act of negligence on plaintiff's part will prevent him from recovering; "only if **he has been negligent in the final stage, and at the decisive point of the event,** so that the mischief, as and when it happens, is immediately due to his own want of care, and not to the defendants (*g*).

(*f*) See, for instance, *Hartley* v. *Rochdale Corporation* (1908) 2 K. B. 591; *Osborn* v. *Metropolitan Water Board* (1910), 26 T. L. R. 283; *Rosenbaum* v. *Metropolitan Water Board*, *ibid.* 510; and as to statutory duties generally, *Tozeland* v. *West Ham Guardians* (1907) 1 K. B. 920.

(*g*) Pollock, 8th ed., pp. 459—460. This defence must be specially

In *Fordham* v. *L. B. & S. C. Rail. Co.* (*h*), defendant's guard, **without warning**, forcibly closed the door of a railway carriage, thereby injuring the hand of the plaintiff, who was in the act of getting into the carriage, the train not being in motion. Held, there was no contributory negligence on plaintiff's part. In *Richardson* v. *Metropolitan Rail. Co.* (*i*), the facts were similar, **but the guard gave due warning before shutting the door.** Held, that plaintiff was disentitled, by his contributory negligence, from recovering. In *Butterfield* v. *Forrester* (*k*), plaintiff, riding violently home in the dusk, came against a pole left by defendant in the highway, and was thrown from his horse and injured. Held, defendant was not liable, owing to plaintiff's contributory negligence.

Another way of stating the above rule is, that plaintiff's negligence will not prevent him from recovering, if defendant, by being ordinarily careful, might have averted the consequence of such negligence. The leading case, which may be said to

pleaded, thus differing from the defence of inevitable accident which can be raised by a mere denial of negligence: *Rumbold* v. *London C. C.* (1909), 25 T. L. R. 541.

(*h*) (1868), L. R. 3 C. P. 368.

(*i*) (1868), L. R. 3 C. P. 374, n. The recent cases of *Drury* v. *N. E. Ry. Co.* (1901) 2 K. B. 322, and *Taylor* v. *Great Southern and Western Ry. Co.* (1909) 2 Ir. R. 330, may be usefully compared with these two cases.

(*k*) (1809), 11 East, 60; 10 R. R. 433.

have settled the doctrine of contributory negligence in its modern form, is *Tuff* v. *Warman* (*l*), which was an action against the pilot of a Thames steamer for running down a barge. Though no look-out was kept on the plaintiff's barge, defendant was held liable on the above ground. The earlier and well-known case of *Davies* v. *Mann* (*m*) is an illustration of the same rule. In that case the plaintiff had negligently left his donkey, with its legs tied, in the public highway, and defendant drove over and killed it. Held, defendant was liable on the above ground.

Again, if the plaintiff knows of the danger caused by the defendant's negligence, but nevertheless continues, he elects to take the risk, and cannot complain if he is injured (*n*).

It is doubtful whether animals can lawfully be allowed to stray on the highway, but the mere fact that they are so straying is not enough to give a cause of action to anyone who falls over them (*o*).

In *Wakelin* v. *L. & S. W. Rail. Co.* (*p*), an action

(*l*) (1857–8), 2 C. B. N. S. 740; 5 C. B. N. S. 573.

(*m*) (1842), 10 M. & W. 546.

(*n*) *Torrance* v. *Ilford U. D. C.* (1909), 73 J. P. 225 (C. A.); but see *Gould* v. *Birkenhead Corpn.* (1910), 74 J. P. 106.

(*o*) *Higgins* v. *Searle* (1909), 100 L. T. 280; cf. *Hadwell* v. *Righton* (1907) 2 K. B. 345; and *Cox* v. *Burbidge*, p. 218, *infra*.

(*p*) (1887), 12 App. Cas. 41. See also *Davey* v. *L. & S. W. Ry. Co.* (1883), 12 Q. B. D. 70; and cf. *Smith* v. *S. Eastern Ry. Co.* (1896) 1 Q. B. 178.

under Lord Campbell's Act was brought by the widow of a man who was found killed on a level crossing of defendant company's line, there being no evidence as to how he came to be there. The defendant company was held not liable; for even assuming (but without deciding) that there was evidence of defendant company's negligence, there was no evidence to connect such negligence with the accident.

Contributory negligence of children.—A child is to be judged as a child, and is not to be expected to exercise the same amount of care as a person of mature years. He must not, however, get into mischief to the extent of doing what he knows to be wrong. If he does, he is guilty of contributory negligence, which will disentitle him from recovering.

In *Lynch* v. *Nurdin* (*q*), defendant negligently left a horse and cart unattended in the street. Plaintiff, aged seven, climbed on the cart in play, and another child led the horse on, whereby plaintiff was thrown down and hurt. Held, that defendant was liable on the above ground. This case was doubted in *Lygo* v. *Newbold* (*r*); and the tendency of later authorities is in the direction

(*q*) (1841), 1 C. B. 29; approved by C. A., in *Harrold* v. *Watney* (1898) 2 Q. B. 320.

(*r*) (1854), 9 Ex. 302.

of limiting defendant's responsibility in such cases (*s*).

In *Abbott* v. *Macfie* (*t*), plaintiff, aged seven, got upon the cover of a cellar left leaning against a wall by defendant. The cover fell, injuring plaintiff. Held, he could not recover. In *Mangan* v. *Atterton* (*u*), defendant left unattended a machine which anyone could set in motion, and plaintiff, aged four, by the direction of his brother, aged seven, put his hands in the machine while his brother turned the wheel. The plaintiff was injured, but it was held that defendant was not liable. In *Singleton* v. *Eastern Counties Rail. Co.* (*x*), plaintiff, aged three, was injured by a passing train while sitting on a railway parapet. Held, that the company was not liable, rather however on the ground that there was no evidence of negligence against the defendant than that the plaintiff was disentitled from recovering by reason of contributory negligence.

The common law rule of contributory negligence is not part of the maritime law administered in

(*s*) But see on the whole topic *Cooke* v. *Midland G. W. Ry. Co.* (1909) A. C. 229; distinguished in *Schofield* v. *Bolton Corpn.* (1910), 26 T. L. R. 230; cf. *Stevenson* v. *Glasgow Corpn.* (1908) S. C. 1034.

(*t*) (1864), 33 L. J. Ex. 177.

(*u*) (1866), L. R. 1 Ex. 239; see, however, *Clark* v. *Chambers* (1878), 3 Q. B. D. at pp. 338, 339.

(*x*) (1859), 7 C. B. N. S. 287.

courts of Admiralty jurisdiction, the loss being equally divided in case of collision where both ships are in fault; and this rule was expressly reserved in the Admiralty Division by the Jud. Act, 1873, sect. 25, sub-sect. (9). This rule of the Admiralty Court is, however, to some extent superseded by the provisions of sect. 419, sub-sect. (4), of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

Doctrine of identification.—According to *Thorogood* v. *Bryan* (*y*) if A., travelling in B.'s carriage, driven by B.'s servant, is injured in a collision with C.'s carriage, the negligence of B.'s servant being the proximate cause of the accident, A. was considered to be so identified with B. as to be disentitled from suing C. This is no longer the law since the judgment of the Court of Appeal in *The Bernina* (*z*), in which case there was a collision between two ships, both in fault. The officer in charge, the chief engineer off duty, and a passenger, all belonging to the same ship, were drowned. Held, in an action against the owners of the other ship, overruling *Thorogood* v. *Bryan* (*a*), that the representatives of the officer in charge, who was directly responsible for the navigation of the ship at the time of the

(*y*) (1849), 8 C. B. 115.

(*z*) (1887), 12 P. D. 36; affirmed by the House of Lords, nom. *Mills* v. *Armstrong* (1888), 13 App. Cas. 1.

(*a*) (1849), 8 C. B. 115.

collision, could recover nothing, but that the representatives of the chief engineer and passenger could do so; the law being that where damage is sustained by the concurrent negligence of two or more persons, there is a right of action against all or any of them at plaintiff's option, and the exception of contributory negligence extends only to the acts and defaults of plaintiff himself, or of those who are really his agents. *Waite* v. *N. E. Rail. Co.* (*b*) was distinguished and approved on the ground that persons dealing with an adult and also with an infant or imbecile of whom the adult has charge, are entitled to expect reasonable care on the part of the adult, both for himself and for the helpless person in his charge. In the case last cited, the plaintiff, a little boy, aged five, and his grandmother, were knocked down in crossing a line; the former was much injured, the latter killed. Held, that the little boy was so identified with his grandmother that her negligence was his, and, on this ground, that the plaintiff was disentitled from recovering by reason of contributory negligence.

Of certain Wider Duties imposed by the Policy of the Law in certain Special Cases.

"Everyone must so use his own as not to do damage to another." This was laid down as law

(*b*) (1859), E. B. & E. 719.

more than two hundred years ago by Holt, C.J., in *Tenant* v. *Goldwin* (*c*), and it is the principle of the leading case of *Rylands* v. *Fletcher* (*d*), a principle which was reasserted in the recent case of *The Eastern and South African Telegraph Co., Ltd.* v. *The Capetown Tramways Co., Ltd.* (*e*), and was declared to apply to cases where the artificial source of danger which the land-owner accumulates is electricity (*f*).

Sic utere tuo ut alienum non lædas. "A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape" (*g*). In *Rylands* v. *Fletcher* (*h*), the

(*c*) (1705), 2 Lord Raym. 1092.

(*d*) (1868), L. R. 3 H. L. 330.

(*e*) (1902) A. C. 381.

(*f*) But on the particular facts of this case it was held that the plaintiffs could not recover because the damage complained of, done by the escape of the electricity, namely, irregularity in the working of the plaintiffs' own electric cables, did not amount to an interference with the *ordinary* use of property, to which alone the extreme responsibility established in *Rylands* v. *Fletcher* extends. See further on this point Kenny's Cases on the Law of Tort, p. 60, Cambridge University Press, 1904.

(*g*) Per cur. in *Fletcher* v. *Rylands* (1866), L. R. 1 Ex. 277; cited with approval by Cairns, L.C., in the House of Lords (1868), L. R. 3 H. L. at p. 339.

(*h*) (1868), L. R. 3 H. L. 330; *Whitmores* (*Edenbridge*) v. *Stanford* (1909) 1 Ch. 427.

defendants employed a competent engineer to make them a reservoir. Certain old mine shafts were discovered and filled in unknown to the defendants. The water escaped through the shafts and injured plaintiff's mine. Held, the defendants were liable without any question of negligence. Such a person is not, however, responsible if the escape is due to—

(1) Causes beyond his own control, and amounting to act of God, *i.e.*, an accident "due to natural causes directly and exclusively, without human intervention," and such "that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected" (*i*). In *Nichols* v. *Marsland* (*k*), the defendant owned artificial lakes formed by damming a natural stream, into which the water was finally let off by a system of weirs. Owing to a violent storm, an overflow occurred which carried away four county bridges, whereby the action. Held, defendant was not liable;

(2) Plaintiff's fault;

(3) Wrongful act of third party (*l*);

(4) Artificial work maintained for the common

(*i*) Per James, L.J., in *Nugent* v. *Smith* (1876), 1 C. P. D. at p. 444.

(*k*) (1875), L. R. 10 Ex. 355.

(*l*) *Box* v. *Judd* (1879), 4 Ex. D. 76.

benefit of plaintiff and defendant. In *Carstairs* v. *Taylor* (*m*), the defendant was the plaintiff's landlord, and was living on the floor above him. Some rats gnawed a rain-water box maintained by the defendant for the benefit both of himself and the plaintiff, and the water running through injured plaintiff's goods below. Held, no action lay;

(5) An act authorised by statute (*n*).

This of course, however, pre-supposes that the damage has been **solely** caused by the act of God, or of a third party, &c., and that the defendant had not contributed to it by some distinct breach of duty, as in *Nitro-Phosphate Co.* v. *Lond. & St. Kath. Dock Co.* (*o*), for in such a case the defendant will not be excused.

Keeping in cattle.—The owner of cattle must keep them from straying on the land of others **at his peril**, though he is liable only for natural and probable consequences, not for an unexpected event—*e.g.*, damage caused by the kick of a horse not known to be vicious (*p*).

(*m*) (1871), L. R. 6 Ex. 217; cf. *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602.

(*n*) *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418; and see pp. 24—27, *supra*.

(*o*) (1878), 9 Ch. D. 503.

(*p*) *Cox* v. *Burbidge* (1863), 13 C. B. N. S. 430; 32 L. J. C. P. 89. The placing of entire animals on a common may be made a

But this rule has no application to damage done by **cattle straying off a highway along which they are being lawfully driven.** In such a case the owner is only liable on proof of negligence. In *Tillett* v. *Ward* (*q*), an ox, whilst being driven through a town, ran into a shop, and there did damage. Held, the owner was not liable.

Liability of owners of ferocious animals for injuries committed by them.

The rule is that "if a man keep an animal whose nature is ferocious or an animal of a class not generally ferocious but which is known to the owner to be dangerous . . . he is bound to keep it secure at his peril" (*r*). There are two classes of cases. The owner is:—

1. **Always liable for injuries of animals naturally ferocious**—*i.e.*, animals by their very nature likely to do injury. "Though he has no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea, an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action

summary offence under the Commons Act, 1908 (8 Edw. 7, c. 44), s. 1.

(*q*) (1882), 10 Q. B. D. 10; *Higgins* v. *Searle* (1909), 100 L. T. 280 (C. A.); *Hadwell* v. *Righton* (1907) 2 K. B. 345; and see p. 211, *supra*.

(*r*) Per Cozens-Hardy, M.R., in *Baker* v. *Snell* (1908) 2 K. B. p. 828.

for the damage" (*s*). Thus, in *May* v. *Burdett* (*t*), the owner of a monkey was held liable for the animal biting a lady, and in *Filburn* v. *The People's Palace and Aquarium Co., Limited* (*u*), the plaintiff recovered damages for injuries inflicted upon him by an elephant exhibited by the defendants.

2. **Liable for injuries of animals not naturally ferocious**—*i.e.*, animals not by their nature likely to do injury—**on proof of scienter**, *i.e.*, previous knowledge of the creature's mischievous propensities (*x*). Therefore it was formerly held that the owner of sheep or cattle worried by a dog could not recover damages from the owner of the dog without proof of *scienter*. Now, however, "a dog is no longer entitled even to one worry," for by the **Dogs Act, 1906** (*y*), the owner of worried sheep or cattle can recover damages without proof of *scienter* or negligence of the owner. The term "cattle" now expressly includes mules, asses, sheep, goats and swine (*z*). And it seems that in both these

(*s*) Hale's Pleas of the Crown, vol. i. p. 430.
(*t*) (1846), 9 Q. B. 101.
(*u*) (1890), 25 Q. B. D. 258.
(*x*) *Baker* v. *Snell* (1908) 2 K. B. 825; but see *Lowery* v. *Walker* (1910) 1 K. B. 173, *ante*, p. 74.
(*y*) 6 Edw. 7, c. 32.
(*z*) Sect. 7.

cases the owner is liable even where the injury is caused by the independent act of a third person (*a*).

At common law a man was bound **at his peril** to keep his own **fire** safely so as not to do damage to another; but by the Building Act of 1744 **(14 Geo. 3, c. 78), s. 86,** as interpreted in *Filliter* v. *Phippard* (*b*), a man is not liable for damage caused by a fire which began in his house or on his land, provided that it originated by accident, and without negligence.

A man who brings fire dangerously near the property of another, *e.g.*, by running a locomotive engine without express statutory authority, or by running a traction engine on the highway, does so **at his peril** (*c*).

As regards liability attending the use of specially dangerous things, the courts have been chiefly occupied with cases of a similar nature to those set out above; but other instances have from time to time, though less often, engaged their attention. This branch of the law cannot as yet be regarded as settled, but it is submitted that persons using things in their nature specially dangerous, such as

(*a*) *Baker* v. *Snell*, *supra*.

(*b*) (1847), 11 Q. B. 347.

(*c*) *Jones* v. *Festiniog Railway Co.* (1868), L. R. Q. B. 733; *Powell* v. *Fall* (1880), 5 Q. B. D. 597; *Sadler* v. *South Staffordshire, &c. Co.* (1889), 23 Q. B. D. 17; *Gunter* v. *James* (1908), 72 J. P. 448; but see *Wing* v. *L. G. O. Co.*, p. 207, *supra*.

loaded firearms, explosives, and poisonous drugs, do so at their peril, and are liable for any damage arising therefrom, wholly irrespective of any question of negligence (*d*). See the cases of *Dixon* v. *Bell* (*e*), *Langridge* v. *Levy* (*f*), *Farrant* v. *Barnes* (*g*), *George* v. *Skivington* (*h*), *Clarke* v. *Army and Navy Co-operative Society* (*i*), *Bamford* v. *Goole &c. Transport Co.* (*j*), and the American case of *Thomas* v. *Winchester* (*k*), and on the whole of this somewhat doubtful subject see Pollock, 8th ed. pp. 504—507.

(*d*) *Dominion Natural Gas Co.* v. *Collins* (1909) A. C. 640.
(*e*) (1816), 5 M. & S. 198 ; 17 R. R. 308.
(*f*) *Supra*, p. 194.
(*g*) (1862), 11 C. B. N. S. 553.
(*h*) (1869), L. R. 5 Ex. 1.
(*i*) (1903) 1 K. B. 155 ; *supra*, p. 191.
(*j*) (1910) 2 K. B. 94.
(*k*) (1852), 6 N. Y. 397.

CHAPTER XI.

OF CERTAIN MISCELLANEOUS MATTERS.

THE text-books state that **where a tort is also a felony, there is no right of action until the wrongdoer has been prosecuted for the crime**, and in 1885, in the case of *Appleby* v. *Franklin* (*a*), Wills, J., in a Divisional Court, said, "The authorities . . . leave no room for doubt that no action can be maintained for a civil injury resulting to the plaintiff from a felonious act on the part of the defendant, until public justice has been vindicated by a prosecution of the criminal."

On the other hand, in the case of *The Midland Insurance Co.* v. *Smith* (*b*), in the course of an elaborate judgment reviewing all the authorities on the question, Watkin Williams, J., said, "In the case of *Ex parte Ball, In re Shepherd* (*c*), in 1879, the doctrine that it was a condition precedent to the enforcing the civil remedy that the felon should have been first prosecuted, if it ever had any solid foundation, was finally exploded."

(*a*) 17 Q. B. D. at p. 95.
(*b*) (1881), 6 Q. B. D. at p. 574.
(*c*) 10 Ch. D. 667.

The attention of the Court in *Appleby* v. *Franklin* was not, however, drawn either to the case of *Ex parte Ball* or to that of *The Midland Insurance Co.* v. *Smith*, and the law on this point cannot therefore be considered as settled.

It used to be said that the trespass was "merged in the felony," which until 1870 was practically true, as up to that date, on conviction of felony, the felon's property was forfeited to the Crown, and therefore it was useless to bring an action. "The principle upon which the rule is founded seems to be that the interest of the public requires that the law shall be vindicated before the individual who is wronged shall be permitted to have recourse to a civil remedy" (*d*).

The rule, if it exists, has no application—

1. To misdemeanours.
2. Where the plaintiff is not the person injured by the felonious act of the defendant (*e*).
3. Where the defendant is some person other than the person guilty of the crime (*f*).

Moreover, it is not known how the rule can be enforced. It is certainly no ground for the judge

(*d*) Per Huddleston, B., in *Appleby* v. *Franklin* (1885), 17 Q. B. D. at p. 94.

(*e*) *Osborn* v. *Gillett* (1873), L. R. 8 Ex. 88; *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93.

(*f*) *White* v. *Spettigue* (1845), 14 L. J. Ex. 99.

at the trial to direct a non-suit (*g*), nor is the Statement of Claim bad for showing on the face of it that the wrongful act is a felony (*h*). The rule cannot be raised by plea, since then the party sets up his own criminality. In *Wells* v. *Abrahams* (*i*), Cockburn, C.J., and Blackburn, J., suggest that if an action were brought against a person who was either being prosecuted for felony or liable to such prosecution, the summary jurisdiction of the Court might be invoked to stay proceedings which would involve an undue use, probably the abuse, of the process of the Court; whilst in *Appleby* v. *Franklin* (*k*) the Court were apparently of the same opinion, and, though the case went off on another point, it certainly appears from the report that the Court would, if necessary, have been prepared to enforce the rule by striking out the Statement of Claim. Thus Huddleston, B. (*l*), said, "It seems to be clear . . . that it is in the power of the Court to strike out the claim upon a summary application." There is, however, no case where this power has in fact been exercised, and, as already stated, the

(*g*) *Wells* v. *Abrahams* (1872), L. R. 7 Q. B. 563, overruling *Wellock* v. *Constantine* (1863), 2 H. & C. 146.

(*h*) *Roope* v. *D'Arigdor* (1883), 10 Q. B. D. 412; *Midland Insurance Co.* v. *Smith* (1881), 6 Q. B. D. 561.

(*i*) (1872), L. R. 7 Q. B. 563.

(*k*) (1885), 17 Q. B. D. 93.

(*l*) *Ibid.* p. 94.

attention of the Court in *Appleby* v. *Franklin* was not drawn to the various authorities on the question. In *Ex parte Elliott* (*m*), the rule was effectually applied to exclude a proof in bankruptcy; while in *Ex parte Ball, In re Shepherd* (*n*), though it was admitted to be the expressed opinion of centuries, it was severely criticised by Bramwell, L.J., but unfortunately it was not there necessary to decide the point.

The difficult subject usually described by the misleading phrase "**Tort founded on contract**," cannot be treated satisfactorily in the limited space of this work. The reader is referred to Pollock, 8th ed., Chap. XIII. (where a full discussion of the subject will be found), and it should be observed that the key to the subject is, that the right of action is independent of the contract, and that the contract on the same subject is merely accidental. The following cases are worthy of especial note:—

Denton v. *G. N. R.* (*o*): An intending passenger was held to have a remedy for damage caused by acting on an erroneous announcement in a time-table, probably on the ground of the time-table amounting to a proposal of contract; certainly on the ground of its being a false representation.

(*m*) (1837), 3 M. & A. 110. (*n*) (1879), 10 Ch. D. 693.
(*o*) (1856), 5 E. & B. 860.

Austin v. *G. W. R.* (*p*): Plaintiff—a child just above the age at which children can pass free of charge—was injured by an accident on defendant company's line whilst travelling with his mother, who had taken a ticket for herself only. Held, the company was liable, either as having contracted to carry the mother and her child, or, independently of contract, because the child was accepted as a passenger, and this cast a duty on the company to take reasonable care to carry him safely.

Marshall v. *York, Newcastle, and Berwick Rail. Co.* (*q*): Plaintiff successfully sued defendant company for the loss of his luggage by the company's negligence, though the ticket was paid for by his master, on the ground that the company had accepted the servant and his luggage to be carried, and were answerable under the general duty thus arising: a duty which would still exist if the passenger and his luggage had been lawfully in the train without any contract at all.

Foulkes v. *Metrop. District Rail. Co.* (*r*): Plaintiff, a passenger, was hurt on alighting at a station, owing to the carriages being unsuited to the platform. The station and platform belonged to the South-Western Railway Company, by whose clerk the plaintiff's ticket was issued; the train belonged

(*p*) (1867), L. R. 2 Q. B. 442. (*q*) (1851), 11 C. B. 655.
(*r*) (1880), 5 C. P. D. 157.

to defendant company, who had running powers over the South-Western line. Held, defendant company was liable, even if plaintiff's contract were with the South-Western Railway Company, solely on the ground that defendant company actually received plaintiff as a passenger, and thereby undertook the duty of not exposing him to unreasonable peril in any matter incident to the journey.

Alton v. *Midland Rail. Co.* (*s*): Plaintiff sued defendant company for loss of services of his servant, who was injured by defendant company's negligence whilst travelling on their line, the servant having paid for his ticket. It was held that no action lay, on the ground that the injury was caused by a breach of duty arising wholly out of the company's contract with the servant. Although this case has not been overruled, "it has," as Lindley, L.J., pointed out in the Court of Appeal (*t*), "been criticised and commented upon somewhat adversely"; and it is submitted that it is bad law, as being inconsistent with the principles laid down in *Marshall* v. *Y. N. & B. Rail. Co.*, and *Foulkes* v. *M. D. Rail. Co.* (*u*), which proceed on the

(*s*) (1865), 19 C. B. N. S. 213.

(*t*) In *Taylor* v. *Manchester, Sheffield, & Lincolnshire Railway Co.* (1895) 1 Q. B. at p. 139.

(*u*) *Supra*, p. 227. See also *Baker* v. *Bolton* (1808), 1 Camp. 493; *Kelly* v. *Metropolitan Railway Co.* (1895) 1 Q. B. 944; *Meux* v. *G. E. Railway Co.* (1895) 2 Q. B. 387. For an application of the

existence of a duty, not only in form, but in substance, independent of contract. "The test question, whether the reception of the plaintiff's servant as a passenger would not have created a duty to carry him safely if there had not been any contract with him, is not directly dealt with. . . . A directly contrary decision has been given in the State of Massachusetts" (*x*). And it is clear that the rule cannot apply where the death is ~~not~~ part of and essential to the cause of action. Thus, where a claim was made for damages under an implied warranty of fitness of goods which killed the plaintiff's wife, the plaintiff was held entitled to recover damages (*y*).

As a general rule of the common law the death either of the tort-feasor or of the party injured puts an end to the right of action for a tort.—This rule has been so far extended as to bar a master's right to sue for injuries to his servant which have resulted in the latter's death (*z*). It is usually expressed in the maxim *Actio personalis moritur cum personâ*, a

same principle in case of carriage of goods only, see *Hayn* v. *Culliford* (1879), 4 C. P. D. at p. 185, per Bramwell, L.J.

(*x*) Pollock, 8th ed., p. 545; and see the American case of *Ames* v. *Union Railway Co.* (1875), 117 Mass. 541, which expressly follows *Marshall's case.*

(*y*) *Jackson* v. *Watson* (1909) 2 K. B. 193. (The claim was in *contract.*)

(*z*) *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88; *Clark* v. *L. G. O. Co.* (1906) 2 K. B. 648.

maxim which is apt to mislead, for it appears to include contracts which, with the exception of promises of marriage (*a*), it does not, and never did. Executors have always been on the one hand able to sue, and on the other liable to be sued, on contracts entered into by their testator. The rule is now subject to the following exceptions :—

I. In relation to the death of the injured person.

(1) By statutes temp. Edw. 3 (4 Edw. 3, c. 7 ; 25 Edw. 3, c. 5), where an injury has been committed to the goods and chattels of a person who afterwards dies, the right of action survives to his executors and administrators.

(2) By stat. 3 & 4 Will. 4, c. 42, s. 2, where there has been an injury to the real estate of any person, and such person dies, the right of action survives to his executors or administrators, provided (i) the injury was committed within six months of owner's death ; *and* (ii) the action is brought within one year after death.

(3) By the Fatal Accidents Act, 1846, 9 & 10 Vict. c. 93 (commonly known as **Lord Campbell's Act**), **s. 1,** "where a person's

(*a*) Executors cannot sue for breach of promise of marriage without proof of special damage to their testator's personal estate : *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408 ; 15 R. R. 295. Nor does the action lie against executors without special damage : *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494.

death is caused by the wrongful act, neglect, or default of another, and the injured person, if he had lived, could have maintained an action, and recovered damages in respect thereof, the person who would have been liable in such case shall be liable to an action for damages, notwithstanding the death of the injured person, and although the death shall have been caused under such circumstances as amount in law to a felony."

By sect. 2, such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased.

By 27 & 28 Vict. c. 95, where there is no executor or administrator, or if no action is brought within six months by him, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative would have sued.

Lord Campbell's Act is a very strange one; strictly speaking, it is not an exception to the rule, for it did not reverse the common law maxim, as it surely ought to have done, but only allows the representative a new right of action if he or she fall within a very limited and clearly defined class

of persons (husband, wife, parent, and child). "**Parent**" includes grandfather, grandmother, stepfather, stepmother; and "**child**" includes grandchild and stepchild, a child *en ventre sa mère* (*b*), but not an illegitimate child (*c*).

The jury must apportion the damages awarded amongst the persons for whose benefit the action is brought. By sect. 4, the action must be brought within one year after death, and only one action can be brought for the same cause of complaint.

The parties for whose benefit the action is brought are to be compensated only for the **pecuniary loss** they suffer through the death of the deceased. Thus, no action lies for merely nominal damages (*d*); nor can the jury lawfully increase the damages by adding a solatium for the mental sufferings incurred by the death (*e*); nor can funeral expenses be recovered (*f*); but a legal right to receive benefit from the deceased need not be shown (*g*). In the words of Pollock, C.B., in *Franklin* v. *S. E. Rail Co.* (*h*), "the damages . . . should be calculated in reference to a reasonable expectation of pecuniary benefit,

(*b*) *The George and Richard* (1871), L. R. 3 Ad. & Ecc. 466.
(*c*) *Dickinson* v. *N. E. Railway Co.* (1863), 2 H. & C. 735.
(*d*) *Duckworth* v. *Johnson* (1859). 29 L. J. Ex. 25.
(*e*) *Blake* v. *Mid. Railway Co.* (1852), 18 Q. B. 93.
(*f*) *Dalton* v. *S. E. Railway Co.* (1858), 4 C. B. N. S. 296; *Clark* v. *L. G. O. Co.* (1906) 2 K. B. 648.
(*g*) *Franklin* v. *S. E. Railway Co.* (1858), 3 H. & N. 211.
(*h*) (1858), 3 H. & N. at p. 214.

as of right or otherwise, from the continuance of the life." Sums which became due on the death by virtue of any policy of assurance are not to be taken into account (*i*).

There is no action if the deceased had accepted satisfaction for his injuries before his death, nor if the loss arises not from the relationship, but through some contract, with the deceased.

Lord Campbell's Act applies to the case of a foreigner whose death is caused by an accident on the high seas, at all events where the defendant is English (*k*).

(4) **By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1**, where a workman whilst engaged in his employer's service sustains personal injury from certain causes specified in the Act (see pp. 46—52, *supra*), and "the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work "(*l*).

(*i*) Fatal Accidents (Damages) Act, 1908.
(*k*) *Davidson* v. *Hill* (1901) 2 K. B. 606.
(*l*) 43 & 44 Vict. c. 42, s. 1.

(5) By the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13 (see pp. 52—66, *supra*), "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable. 'Dependants' mean such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would, but for the incapacity due to the accident, have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings shall include such an illegitimate child and parent or grandparent respectively." And where a right to compensation has vested in a "dependant," who dies before the award, the right passes to the personal representatives of the dependant (*m*).

(*m*) *United Collieries* v. *Simpson* (1909) A. C. 383.

II. In relation to the death of the tort-feasor.

(1) **Independently of statute,** where property, or the proceeds of property, belonging to another have been appropriated by the deceased wrongdoer, and added to his own estate or moneys, an action lies against the executor of the wrongdoer; but this rule is limited to the recovery of **specific acquisitions, or their value,** and can only be maintained if there is some beneficial property or value capable of being measured, followed, and recovered. Thus, an action will lie in respect of ore dug or timber cut by the deceased wrongdoer, but not for an assault, or for ploughing up meadows (*n*).

(2) **By 3 & 4 Will. 4, c. 42, s. 2,** an action may be brought against the executors and administrators of the deceased wrong-doer for wrongs done by the deceased in respect of real or personal property of the deceased, provided—

(1) The injury was committed within six calendar months of the wrongdoer's death; and

(2) The action is brought within six months of the appointment of executors and administrators.

(*n*) *Bishop of Winchester* v. *Knight* (1717), 1 P. W. 406; *Phillips* v. *Homfray* (1883), 24 Ch. D. 439; *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377; *In re Duncan, Terry* v. *Sweeting* (1899) 1 Ch. 387

CHAPTER XII.

OF REMEDIES AND MEASURE OF DAMAGES RECOVERABLE.

Remedies are either (A) Judicial, or (B) Extra-judicial.

(A) Judicial.

I. An action for damages, which are:—

1. **Nominal.**—A sum of no substantial amount awarded in two classes of cases (a) when the plaintiff seeks to establish a right and does not ask for substantial damages; (b) when the jury think that though the plaintiff has a claim he has suffered no real damage, in which case the damages are said to be **contemptuous** (*a*).

In certain cases the plaintiff must prove actual damage, or he will fail, *e.g.*, in an action for negligence (*b*), nuisance (*c*), deceit (*d*), and in certain cases of slander (*e*).

(*a*) See the observations of Phillimore, J., in *Redman's Syndicate* v. *Associated Newspapers* (1910), 26 T. L. R. at p. 395.
(*b*) *Supra*, p. 201.
(*c*) *Supra*, p. 91.
(*d*) *Supra*, p. 187.
(*e*) *Supra*, p. 138.

2. **Ordinary.**—A sum awarded as a fair measure of compensation (*not* restitution) to plaintiff.
3. **Exemplary.**—Expressing indignation at defendant's wrong, not mere compensation to plaintiff—*e.g.*, in an action for seduction (*f*), or trespass accompanied by insult (*g*).

Measure of damages recoverable.—It is impossible here to give more than an outline of the subject (*h*).

Three questions have to be considered:—

(i) What **circumstances** should the jury take into account in assessing damages?

(ii) What **amount** should they award?

(iii) In reference to what **time** is their award to be made?

(i) **Circumstances.**—The jury are subject to the direction of the Court as to what consequences of the wrongful act are to be taken into account, or rejected as being too **remote** (*i*).

The general rule is that the wrongdoer is liable for the **natural and probable consequences** of his act (*k*). He is further liable for any **special consequences** which may ensue if he has, at the time of

(*f*) *Supra*, p. 117.

(*g*) *Merest* v. *Harvey* (1814), 5 Taunt. 441; 15 R. R. 548.

(*h*) For more detailed information the reader is referred to one of the larger treatises, such as Mayne on Damages.

(*i*) Per Blackburn, J., in *Hobbs* v. *L. & S. W. Ry. Co.* (1875), L. R. 10 Q. B. at p. 122; and per Lord Esher, M.R., in *Hammond* v. *Bussey* (1888), 20 Q. B. D. at p. 89.

(*k*) *Hadley* v. *Baxendale* (1854), 9 Exch. 341.

his wrongdoing, notice of the special circumstances by reason whereof those consequences will naturally and probably ensue as a result of his wrongdoing (*l*), for "the rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort" (*m*).

There are numerous examples of this rule. Thus, after some doubt, it was settled that the illegal acts of third parties come within it, if such acts were contemplated or reasonably to be expected as a consequence of the defendant's wrongful acts (*n*). So too, a person who utters a slander to a third party whom he authorizes to repeat it or whose duty it is to report it, will be liable for the consequences of its repetition (*o*), but not if the third party voluntarily repeats it, being under no obligation to do so (*p*).

The jury will not assess damages for losses the amount of which depends upon a series of contingencies which might never occur (*q*).

(*l*) *Ibid.*; *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670.

(*m*) Per Lord Esher, M.R., in *The Notting Hill* (1884), 9 P. D. at p. 113.

(*n*) *Lynch* v. *Knight* (1860), 9 H. L. Cas. 577 at p. 600; *McDowall* v. *G. W. Ry. Co.* (1902) 1 K. B. 618.

(*o*) *Kendillon* v. *Maltby* (1842), Car. & M. 403, at p. 408.

(*p*) *Ward* v. *Weeks* (1830), 7 Bing. 211; but see *Riding* v. *Smith* (1876), 1 Ex. D. 91, at p. 94; and *Ratcliffe* v. *Evans* (1892) 2 Q. B. 524.

(*q*) *Sapwell* v. *Bass* (1910), 26 T. L. R. 452.

But it is not a natural consequence of overcrowding in a railway carriage, that one passenger should steal from another (*r*). Again, if ancient lights be obstructed, damages cannot be obtained in respect of other lights also obstructed but which are not ancient (*s*).

Where the tort arises out of a contract, the parties may, in general, agree in the contract what amount shall be recoverable (*t*).

The loss must result from the wrongful act. Thus, where plaintiff's ship was injured through the negligence of A. who was then acting as the *defendant's* servant, but the damage was increased through A., who had resumed his position as *plaintiff's* servant, not taking proper precautions, it was held that only damages could be awarded in respect of the original loss (*u*).

As to damages caused by shock without physical contact, see p. 202, *supra*.

Even where the motive is immaterial the jury

(*r*) *Cobb* v. *G. W. Ry. Co.* (1893) 1 Q. B. 459 ; *Anglo-Algerian S.S. Co.* v. *Houlder* (1908) 1 K. B. 659.

(*s*) Per Lord Esher, M.R., *In re London, Tilbury and Southend Ry. Co.* (1889), 24 Q. B. D. at p. 329 ; see also *The Brucellesville* (1908) P. 312.

(*t*) *Baxter* v. *Royal Mail, &c. Co.* (1908) 2 K. B. 626 ; but see *Clarke* v. *West Ham Corporation* (1909) 2 K. B. 858.

(*u*) *The Egyptian* (1910) P. 38 (affirmed H. L. (1910), 79 L. J. P. 57) ; and see *The Bodlewell* (1907) P. 286 ; *The Annie* (1909) P. 176.

in assessing damages are entitled to take into consideration the existence of a wrong motive (*x*) or conduct, *e.g.*, insult (*y*), but not in such a way as to assess damages for it, as though it were a cause of action in itself (*z*). And in like manner the jury may also take into account anything in the nature of excuse (*a*).

Where, however, a tort is committed by two or more joint tort-feasors, the true criterion is the whole injury sustained from the joint wrongful act, and the wrong motive or reasonable conduct of one of the joint tort-feasors should not be taken into account in order to aggravate or mitigate the damages in regard to the other (*b*). Nor should the motive be considered when the defendant is only liable on the principle of "*respondeat superior*" (*c*).

(ii) Amount.—Where there are no circumstances of aggravation, the amount awarded should be a reasonable compensation to the plaintiff. Unlike cases of breach of contract, however, it is frequently impossible to ascertain exactly what is the proper

(*x*) *Emblen* v. *Myers* (1861), 6 H. & N. 54; *Bell* v. *M. Ry. Co.* (1861), 10 C. B. N. S. 287.

(*y*) *Merest* v. *Harvey* (1814) 5 Taunt. 441.

(*z*) *Anderson* v. *Calvert* (1908), 24 T. L. R. 399.

(*a*) *Linford* v. *Lake* (1858), 3 H. & N. 276; *Skull* v. *Glenister* (1864), 16 C. B. N. S. 81.

(*b*) *Clark* v. *Newsam* (1847), 1 Exch. 131.

(*c*) *Black* v. *N. Brit. Ry. Co.* (1908) S. C. 444.

amount, and the jury must do their best on the circumstances they have to take into account (*d*).

For example, in an action arising out of an accident, the plaintiff usually claims for three items pain and suffering, necessary expenses incurred, and loss of earnings and earning capacity. It is obvious that, on the first item, the jury ought not to take the poverty or wealth of the plaintiff into account; on the second, they may or may not do so according to the circumstances of each case, while on the third it is their duty to do so (*e*).

Damages are, as a rule, only an indemnity. Thus, the defendant is not bound to pay the plaintiff for a new thing to replace the old thing destroyed (*f*). So, too, if he detains a ship which the plaintiff was using on an unremunerative route in the hope of future profit, he is not liable to pay damages for the detention, for the plaintiff has suffered no loss (*g*).

In general if the jury exercise their duty fairly and reasonably, their verdict will not be upset, even though the Court disagrees with their estimate.

The Court will, however, order a new trial if the

(*d*) Thus, it is impossible exactly to estimate the damage accruing from injury to a warship, but it will be awarded in a proper case: *The Astrakhan* (1910) P. 172; cf. *Yzquierdo* v. *Clydebank Engineering Co.* (1902) A. C. 524.

(*e*) *Phillips* v. *L. & S. W. Ry. Co.* (1879), 5 Q. B. D. 78.

(*f*) *Lodye Holes Colliery Co.* v. *Wednesbury Corporation* (1908 A. C. 323.

(*g*) *The Bodlewell* (1907) P. 286.

damages awarded are so large that no twelve reasonable men could have given them (*h*), it being clear the jury were influenced by undue motives or considerations to which they should not pay attention (*i*), or were under a misconception of the facts (*k*). So, too, if the damages are inadequate, being clearly due to a mistake in calculation or misconduct of the jury (*l*). But a new trial will not be ordered merely because the verdict is the result of a compromise, for it must be clearly shown that the verdict really amounts to a refusal by the jury to perform their duty (*m*).

(iii) Time.—Damages resulting from one and the same cause of action must be assessed and recovered once for all; *contra*, where the same facts give rise to two distinct causes of action. In *Brunsden* v. *Humphrey* (*n*), plaintiff, whilst driving in his cab, was injured by defendant's negligence. Having recovered damages in an action for the injury to the cab, he then brought a second action for personal injuries. Held, he was entitled to do so, there being two distinct causes of action.

(*h*) *Praed* v. *Graham* (1889), 24 Q. B. D. 53.
(*i*) *Chattell* v. *Daily Mail* (1901), 18 T. L. R. 165.
(*k*) *Creed* v. *Fisher* (1856), 9 Exch. 472; *Gough* v. *Farr*, 1 Y. & J. 477.
(*l*) *Armitage* v. *Haley* (1843), 4 Q. B. 917.
(*m*) *Falvey* v. *Stanford* (1875), L. R. 10 Q. B. 54.
(*n*) (1884), 14 Q. B. D. 141.

Where, therefore, a person has recovered damages, he cannot sue again in respect of unexpected consequences, which have developed afterwards (*o*), and for that reason the jury must take the expectation of future loss into account (*p*). The general rule is that "new actions may be brought as often as new injuries and wrongs are repeated, and not as often as new damage accrues" (*q*). In some cases, however, damage accruing after action may be the foundation of a fresh action, *e.g.*, in a continuing trespass (*r*), or in subsidences (*s*).

II. An application for an injunction. This is only granted where damages would not be an adequate remedy. An interim injunction is only granted when delay would prevent or render extremely difficult the subsequent administration of complete justice.

It used to be thought that an injunction should not be granted to restrain the publication of a libel unless it amounted to a contempt of Court (*t*), but it is now clear that such injunctions, either interlocutory (*u*) or final (*x*), will be granted in proper cases.

(*o*) *Fetter* v. *Beale* (1697), 2 Lord Raym. 339.
(*p*) *Richardson* v. *Mellish* (1824), 2 Bing. 229.
(*q*) *Humbleton* v. *Veere* (1670), 2 Wms. Saund. 171 (b), note 1.
(*r*) *Holmes* v. *Wilson* (1839), 10 Ad. & E. 593.
(*s*) *Infra*, p. 251.
(*t*) *Anon.* 2 Atk. 469; *Clark* v. *Freeman* (1848), 11 Beav. 112.
(*u*) *Bonnard* v. *Perryman* (1891) 2 Ch. 269; *Monson* v. *Tussauds* (1894) 1 Q. B. 671.
(*x*) *Saxby* v. *Easterbrook* (1878), 3 C. P. D. 339.

In case of need, an injunction will be issued to restrain a son going to his parent's house (*y*).

Under the Judicature Act, 1873 (*z*), the Court has power to award damages in addition to or substitution for an injunction.

This discretion is exercised according to the facts of each case, but it will never be exercised so as to compel plaintiff to give the defendant property or rights which the plaintiff is entitled to refuse to grant to him (*a*). But in certain cases the discretion will be exercised, *e.g.*, if the plaintiff has himself used the claim for an injunction in order to extort damages then it will be granted. It has been laid down as a good working rule "that (first) if the injury to the plaintiff's legal right is small, and (secondly) is one which is capable of being estimated in money, and (thirdly) is one which can be adequately compensated by a small money payment, and (fourthly) the case is one in which it would be oppressive to the defendant to grant an injunction, damages in lieu of an injunction may be awarded" (*b*).

(*y*) *Stevens* v. *Stevens* (1907), 24 T. L. R. 20

(*z*) Sect. 34, replacing Lord Cairns' Act

(*a*) *Greenwood* v. *Hornsey* (1886), 33 Ch. D. 471.

(*b*) Per A. L. Smith, L.J., in *Shelfer* v. *City of London E. L. Co.* (1895) 1 Ch. at p. 322; cf. *Jordeson* v. *Sutton Gas Co.* (1899) 2 Ch. 217; and *Riley* v. *Halifax Corporation* (1907), 97 L. T 278.

(B) Extra-judicial.—Roughly comprised under self-help :—

1. Abatement of nuisance (*c*).
2. Expulsion of trespasser (*d*).
3. Peaceable re-entry on land of which possession has been wrongfully taken (*e*).
4. Recaption (*f*).
5. Distress damage feasant; *i.e.*, the taking by an occupier of land of animals or other chattels found encumbering or causing damage to his land. Under such circumstances the occupier is entitled to detain the chattels until he is tendered or paid a fair compensation for the injury (*g*).

No more force is to be used and no more damage done than is absolutely necessary.

What is the remedy of a private individual complaining of the infringement of a special statutory duty? Where the statute creating the duty indicates a remedy of a private nature—*i.e.*, a remedy compensating the injured party (*e.g.*, an action for penalties for the use and benefit of such person)—then such remedy will generally be the only remedy. Where no such remedy of a private nature is provided, the

(*c*) *Supra*, p. 91.
(*d*) *Supra*, p. 67.
(*e*) *Supra*, p. 72.
(*f*) *Supra*, p. 106.
(*g*) Addison on Torts, 8th ed., p. 102.

injured party has not necessarily a private right of action. Whether he has or not depends on the scope and language of the statute taken as a whole (*h*). Moreover, there can be no right of action unless the object of the statute is to prevent injury of the nature complained of. In *Gorris* v. *Scott* (*i*), plaintiff's sheep were washed overboard during a voyage from a foreign port to England, owing to defendant omitting to take the precautions required by the Contagious Diseases (Animals) Act, 1869. Held, defendant was not liable, the object of the statute being to prevent the spread of contagious disease, not to protect animals against the perils of the sea.

In order to maintain an action here in respect of a tort committed outside the jurisdiction, the act complained of must be—

1. **Wrongful by English law.** Thus, in *The Halley* (*k*), there was a collision in Belgian waters. By Belgian law, but not by English law, the owners of the ship were liable, as the collision was caused by the negligence of a pilot compulsorily on

(*h*) *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. Div. 441; *Clegg, Parkinson & Co.* v. *Earby Gas Co.* (1896) 1 Q. B. 592; *Groves* v. *Wimborne* (1898) 2 Q. B. 408; *Johnston* v. *Consumers Gas Co.* (1898) A. C. 447.

(*i*) (1874), L. R. 9 Ex. 125.

(*k*) (1868), L. R. 2 P. C. 193, 204.

board. Therefore they were not held liable here.

2. **Not justifiable by the law of the country where committed** (*l*).

3. **Not of a purely local nature**—*e.g.*, trespass to land (*m*).

Joint tort-feasors may be sued jointly or severally; in other words, where two or more persons have participated in a wrongful act, each wrongdoer is liable for all the damage. Thus, in *Hume* v. *Oldacre* (*n*), the huntsman was held personally liable for all the damage caused by the hunt. The injured party may sue any one or more of the wrongdoers or all of them; **but judgment against one or more is a bar to any further action.**

On the same principle a release granted to one or more of the wrongdoers operates as a discharge of the others, "the reason being that the cause of action which is one and indivisible having been released, all persons otherwise liable thereto are consequently released" (*o*). But a covenant not

(*l*) *Blad's case* (1673–4), 3 Swanst. 603; *The M. Moxham* (1876), 1 P. D. 107; *Machado* v. *Fontes* (1897) 2 Q. B. 231; *Carr* v. *Fracis Times & Co.* (1902) A. C. 176.

(*m*) *Brit. S. Af. Co.* v. *Companhia de Moçambique* (1893) A. C. 602; cf. *Brit. S. Af. Co.* v. *De Beers* (1910) 26 T. L. R. 591; *Deschamps* v. *Miller*, (1908) 1 Ch. 856.

(*n*) (1816), 1 Stark. 352; 18 R. R. 779.

(*o*) Per A. L. Smith, L.J., in *Duck* v. *Mayeu* (1892) 2 Q. B. at p. 513 (C. A.); and see *Howe* v. *Oliver* (1908), 24 T. L. R. 781.

to sue one of two joint tort-feasors does not operate as a release of the other from liability, "the reason being that the joint action is still alive" (*p*).

There is **no contribution between wrongdoers**—*i.e.*, if one of several has been sued, and damage recovered from him, he cannot claim contribution from the others (*q*). Even where there is an express or implied indemnity given to a wrongdoer, the indemnity cannot be enforced if the wrong is so obviously unlawful that no reasonable man in committing it could suppose that he was doing a lawful act (*r*).

(*p*) Per A. L. Smith, L.J., in *Duck* v. *Mayeu* (1892) 2 Q. B. at p. 513 (C. A.).

(*q*) *Merryweather* v. *Nixan* (1799), 8 T. R. 186; 16 R. R. 810; see *Palmer* v. *Wick* (1894) A. C. 318; *The Englishman and The Australia* (1895) P. 212; and *Burrows* v. *Rhodes* (1899) 1 Q. B. 806.

(*r*) *Smith* v. *Clinton* (1908), 99 L. T. 840; *Adamson* v. *Jarvis* (1827), 4 Bing. 66; cf. *Ramskill* v. *Edwards* (1885), 20 Ch. D. 100.

CHAPTER XIII.

OF LIMITATION OF ACTIONS.

The law on the subject of the limitation of actions of tort is contained in the statutes 21 Jac. 1, c. 16, 4 & 5 Anne, c. 3, and 19 & 20 Vict. c. 97, and has been summarized as follows (*a*):—

Trespass to land and goods, conversion, and all other common law wrongs, **except slander by words actionable per se, and injuries to the person.** —Six years.

Injuries to the person.—Four years.

Slander by words actionable *per se*.—Two years.

The statutes begin to run against infants and lunatics on disability ceasing (*b*); and if the defendant is beyond the seas when the right of action arises, the time runs against the plaintiff only from his return. Any action brought against a constable for anything done in the execution of

(*a*) Pollock, 8th ed., p. 210.

(*b*) Formerly this was also true in regard to married women Since the Married Women's Property Act, 1882, however, a married woman is no longer under disability, but can sue as if she were a *feme sole*. See p. 8, *supra*, and *Lowe* v. *Fox* (1885), 15 Q. B. D. 667.

his office must be brought within six months from the date of the act complained of (*c*); and any action against any person for an act done in pursuance or execution or intended execution of a statutory or public duty or authority must be brought within a similar period, or in case of a continuance of injury or damage within six months next after the ceasing thereof (*d*).

Where a wrongdoer fraudulently conceals his wrongful act, the statute does not begin to run in his favour until the person wronged discovers the wrongdoing, or might by reasonable diligence discover it (*e*).

It is important to notice the distinction between wrongs which are actionable per se, and those which are only actionable where the plaintiff can prove that he has suffered actual damage (*f*). In the former case the statutes begin to run from the time when the wrongful act is committed; in the latter, as, for example, where the right to support of land has been infringed, the statutes begin to run not from time of commencement of wrongdoing, but from time of plaintiff's first sustaining actual injury;

(*c*) 24 Geo. 2, c. 44, s. 8.

(*d*) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1, sub-s. (a); see *supra*, pp. 20—22.

(*e*) *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59; *Thorne* v. *Heard* (1895) A. C. 495; *In re McCallum* (1901) 1 Ch. 143.

(*f*) See *supra*, pp. 4, 236.

consequently, plaintiff is not necessarily barred by the Statute of Limitations from maintaining an action seven or eight years after defendant's beginning to do what ultimately resulted in injury to the plaintiff (*g*).

In *Darley Main Colliery Co.* v. *Mitchell* (*h*), the defendant, owner of a coal mine, worked it in 1868, thereby letting down plaintiff's cottages, which defendant repaired. In 1882, owing to the same working in 1868, a further subsidence took place, and further damage. Defendant pleaded that the damage took place more than six years after the working of mines had ceased. Held, by the House of Lords, that each subsidence gave a fresh cause of action when arising, and that therefore the action lay.

(*g*) *Backhouse* v. *Bonomi* (1861), 9 H. L. C. 503.

(*h*) (1886), 80 L. T. 264; *West Leigh Co.* v. *Tunnicliff* (1908) A. C. 27; and see *Glynn* v. *Howell* (1909) 1 Ch. 666.

INDEX.

ABATEMENT of nuisance, 70, 91, 245.

ABROAD, torts committed, 246, 247.

ABSOLUTE PRIVILEGE. See *Privilege.*

ACCIDENT,
inevitable, 15, 28, 29.
caused by latent defect, 205, 206.

ACT,
of God. See *Accident—inevitable.*
of necessity, as ground of excuse, 24, 31.
as defence to action for trespass, 69.
of state, as ground of excuse, 15—18.
none, as between sovereign and subject, 16.

ACTION,
to recover land, 71.
of trespass, 67, 68, 69, 99, 106, 107.
of trespass on the case, 106.
of trover, 106, 107.
of detinue, 106, 107.
of replevin, 107, 108.
limitation of right of, 71, 72, 249—251.

ACTOR,
definition of, 14.
privilege of, 15.

ACTUAL DAMAGE. See *Special Damage.*

ADMIRALTY COURTS, rule of, in cases of collision, 214.

AGENT, effect of misrepresentations by, 33, 38, 39, 196—200.

AIR,
no specific right to access of, over neighbour's land, 94, 95.
stoppage of, when injurious to health, action will lie, 95.

ALIEN COMPANY, in same position as alien natural person, 5.

ALIEN ENEMY, no right to sue, 5.

ALIEN FRIEND, under no disability to sue, 5.

AMBASSADORS, FOREIGN,
can sue in English Court, 12.
exempt from civil proceedings, unless privilege waived, *ibid.*

AMENDS, payment into Court of, when apology pleaded, 171.

AMOUNT. See *Measure of Damages.*

ANCIENT LIGHTS, 94, 95—98.

ANIMAL,
liability of owner for injury by,
when naturally ferocious, 219, 220.
when not naturally ferocious, 220.
when straying, 218, 219, 245.

APOLOGY, as defence to action for libel in newspaper or other periodical publication, 140, 171—172.

ARBITRATOR,
not liable for error of judgment, 19.
liable for fraud, *ibid.*

ARREST,
who may, and when, 181.
by constable, *ibid.*
by private person, *ibid.*
by person in authority, 182.
malicious, 177, 186.

ARTIFICIAL WATERCOURSES, rights of riparian proprietors as to, 82, 83.

ASSAULT. See also *Assault and Battery.*
definition of, 177.
liability for, in cases of forcible entry, 72.

ASSAULT AND BATTERY,
when justifiable, 178.
defence to action for, under 24 & 25 Vict. c. 100, ss. 42—45...179, 180.

AUTHORITY OF LAW, as defence to action for trespass, 70.

BAIL, a person who is security may arrest, 181, 182.

BAILEE,
when able to sue for trespass to or conversion of goods, 106.
when liable for conversion, 101, 102.

BAILOR, when able to sue for trespass or conversion of goods, 106.

BANKRUPTCY, effect of, on right of action for tort, 10.

BARBED WIRE, when a nuisance, 76, 77.

BARRISTER, absolute privilege for defamatory statements by, 153.

BATTERY, definition of, 177. See also *Assault and Battery.*

BILL OF EXCHANGE, title to, can be acquired from person who has no title, 102, 103.

BUILDINGS,
right of support to land weighted by, how acquired, 87, 88.
right to support of, from adjoining buildings, 88.

CAMPBELL'S (LORD) LIBEL ACT (6 & 7 Vict. c. 96), s. 2...171.

CAMPBELL'S (LORD) ACT (9 & 10 Vict. c. 93), 22, 41, 51, 202, 212, 230—233.
who can sue under, 231.
damages recoverable under, 232, 233.
time within which action must be brought, 232
extends to foreigners, 233.

CARRIAGES, collision between, 214.

CARRIER of passengers, duty of, 205, 206, 207.

CATTLE,
damage feasant, distress on, 245.
must be kept from straying, or owner liable for probable consequences, 211, 218.
owner not liable for their straying while being driven along highway, 219.
injuries to, by dog, 220.

CAUSE, proximate, in cases of contributory negligence, 209—211.

CHAMPERTY, 123, 124.

CHARACTER of servant, information as to, when privileged, 160—162.

CHATTELS, distress damage feasant on, 245.

CHILD, contributory negligence of, 212, 213.
contributory negligence of person in charge of, 215.

CLUB COMMITTEE, acts of, when privileged, 22, 23.

COLLEGE, act of, when privileged, 22, 23.

COLLISION,
between ships, Admiralty rule in cases of, 214.
between carriages, *ibid.*

COLONY, liability of Governor of, 17, 18.

COMMAND of another, no excuse for unlawful act, 16, 17, 32, 33.

COMMENT,
fair. See *Fair Comment.*
not allowed till termination of judicial proceedings, 168.

COMMON, Rights of, 80.

COMMON EMPLOYMENT,
as defence in action by servant, 45, 46.

COMPANY, liability of, for torts, 11, 36, 37, 140.

COMPANY PROMOTER, liability of, 188 (note), 195, 196.

CONCEALED DANGER, liability where, 75, 76, 77.

CONCEALED FRAUD, effect of, with regard to limitation of actions, 71, 250.

CONSENT to the infliction of bodily harm, 178.

CONSEQUENCES, natural and probable, liability for, 237—239.
in negligence, 201, 202.

CONSPIRACY, 120—123.
law of, altered by Trade Disputes Act, 1906...122, 123.

CONSTABLE,
action must be brought against, within six months of act complained of, 20, 21, 249, 250.
powers of, to arrest, 181.
privileges of, 20.

CONSTRUCTIVE,
entry, what is, 67.
possession, what is, 68.

CONTRACT,
breach of, how distinguished from tort, 2.
infant's liability on tort arising out of, 6, 7.
torts founded on, 226—229.

CONTRACTOR,
employer not usually liable for torts of, 39.
when employer is so liable, 41—44.
how distinguished from servant, 39—41.

CONTRIBUTION, none between wrongdoers, 247—248.

CONTRIBUTORY NEGLIGENCE,
what is, 209—212.
Admiralty rule in cases of, 214.
of children, 212—213.
plaintiff only prevented from recovering if negligent at the final stage, 209—212.

CONVERSION,
definition of, 98.
dominion must be real and effectual, to render liable for, 101.
distinguished from trespass, 99.
refusal to deliver on demand, evidence of, 100.
period of limitation, 249.
remedies for, 106.
what renders a person liable for, 100—102.
when bailee liable for, 101.
when bailor can sue for, 106, 107.
who is entitled to sue for, *ibid.*

CONVICT, cannot generally sue, but can do so in certain cases, 5, 6.

CONVICTION of thief, effect on ownership of stolen property, 103, 104.

COPYRIGHT,
definition of, 111.
at common law, *ibid.*
effect of non-registration, *ibid.*
in encyclopædia articles, *ibid.*
in paintings, sculptures, designs, &c., *ibid.*
in dramatic and musical representations, 112.
in lectures, *ibid.*
how assignable, *ibid.*
none in immoral or libellous work, *ibid.*
time for which it continues, 111.

CORPORATION,
liability of, for torts, 11, 36, 37, 140.
when action for libel or slander maintainable by, 140.

COUNSEL, absolute privilege for defamatory statements by, 153.

COUNTY COUNCILLOR, privilege of, for libel or slander, 155, 156.

COURSE of employment, what is, 34—39.

COURT-MARTIAL, privilege of members of, 19, 156, 157.

CRIME,
how distinguished from tort, 1.
whether prosecution for, necessary before action for tort, 222—226.
maintenance does not apply to, 123.

CROWN, tort by representative of, 15—18.

DAMAGE,
essential in what cases, 4, 236.
not necessary in action for trespass, 67.
special, what is, in action for slander, 126.
when special damage not necessary in action for slander, 138.

DAMAGES,
nominal, 236.
contemptuous, *ibid.*
ordinary, 237.
exemplary or vindictive, *ibid.*
circumstances to be considered, 237—240.
amount of, generally, 240—242.
amount and apportionment of, under Lord Campbell's Act, 232—233.
amount of, recoverable under Employers' Liability Act, 1880...51, and under Workmen's Compensation Act, 1906...61—63.
incidentally arising from act authorised by statute, 24—27.
in lieu of injunction, 244.
in seduction, 119.
when arising from distinct causes of action can be separately recovered, 242, 243, 250.
measure of, 236—243.

DAMNUM SINE INJURIA, 3.

DANGER, concealed, 75, 76, 77.

DANGEROUS THINGS, liability for damage caused by, 215—222.

DEATH,
of injured party, effect on action for tort, 228—229,230—235.
of tort-feasor, effect on action for tort, 229—230, 235.

DECEIT. See *False Representation; Fraud.*
on bankruptcy, rights pass to trustee, 10.
which does not deceive is not fraud, 195.

DEFAMATION. See *Libel; Slander.*

DEFECT,
latent, accident caused by, 205, 206.
of plant, master's liability to servant for, at common law, 44.
under Employers' Liability Act, 47, 48.
knowledge of, and acquiescence in, by workman, effect of, 49—51.

DEFENCE OF PERSON OR PROPERTY, assault justifiable in, 178.

DETINUE, action of, 106—107.

DIRECTORS OF COMPANY, liability of, 188 (note), 195, 196.

DISABILITY, personal, with regard to limitation of actions, 72, 249.

DISCIPLINARY POWERS, as ground of excuse, 23, 178.

DISCRETIONARY POWER conferred by statute, effect of, 27.

DISPOSSESSION.
definition of, 71.
remedy for, 71, 72.

DISTRESS,
effect of misfeasance in course of, 73.
on chattels damage feasant, 245.

DOG, injury by, to sheep or cattle, *scienter* need not be proved, 220.

DRUGS, poisonous, liability for, 222.

DUTY, constituting privileged occasion, 157, 158—165.

EASEMENT, 80 *et seq.*

ECCLESIASTICAL COURT, privilege of, 19, 155.

EJECTMENT, action of, 71. See *Recovery of Land.*

ELECTRICITY, kept at landowner's peril, 216.

EMPLOYERS' LIABILITY ACT, 1880 (43 & 44 Vict. c. 42), 46—52, 233.
workman can contract himself out of, 50. 52.

EMPLOYMENT,
master liable for torts of servants in course of, 33—39.
liability of master for injuries incurred by workman during, 44—46.
usual course of, what is, 34—39.

ENEMY, alien, no right to sue, 5.

ENGINE,
liability for damage caused by,
at common law, 24, 221.
under statutory powers, 25, 26.
under Railway Fires Act, 1905...26.
must not be erected within twenty-five yards of carriage-way unless concealed, 75.

ENTRY,
forcible, 72.
in cases of trespass,
(1) actual, 67, 69.
(2) constructive, *ibid.*

EXCUSE, various grounds of, 14 *et seq.*

EXECUTION, as affecting title to goods, 105.

EXECUTIVE ACTS, as ground of excuse, 14, 19—22.

EXECUTORS,
of injured party, when entitled to bring action, 230—235.
of tort-feasor, when liable to action, 235.

EXEMPLARY DAMAGES, 237.

EXERCISE OF COMMON RIGHTS, as ground of excuse, 14, 29, 30.

EXPLOSIVES, liability for damage caused by, 222.

EXPULSION of trespasser, 67, 72.

FAIR COMMENT,
as a defence to an action for libel or slander, 143, 145, 146.
functions of judge and jury in cases of, 144.
limits of, 145.
matter commented on must be actual fact, 147, 148.
matter of public interest, what is, 148—150.

FALSE IMPRISONMENT,
bankruptcy of plaintiff no defence, 10.
defences to action for, 180—181, 185.
how distinguished from malicious prosecution, 184.
what constitutes, 180.

FALSE REPRESENTATION. See also *Fraud.*
what amounts to, 187—190.
no defence to action for, that defendant had nothing to gain by it, 192, 193.
concerning the credit of another must be in writing and signed to render it actionable, 193, 194.
when made by agent, liability for, 196—200.

FELLOW SERVANT,
injury by, liability of master for,
(1) at common law, 44—46.
(2) under Employers' Liability Act, 1880...47—48.
(3) under Workmen's Compensation Act, 1906...58, 59.

FELON, disabilities of, 5—6.

FELONY,
arrest for,
by constable, 180.
by private person, *ibid.*
by person in authority, 181.
affecting right to sue, 223—226.

FEROCIOUS ANIMALS, liability of owner for injury by, 219—221.

FINDER, right of, 99.

FIRE,
liability for damage caused by, 221.
caused by sparks from engine, liability for, 25, 26, 221.

FIREARMS, liability for damage caused by, 222.

FORCIBLE ENTRY, 72.

FOREIGN SOVEREIGN,
can sue in English Courts, 11.
exempt from civil proceedings unless privilege waived, *ibid.*
defences available in actions by, *ibid.*

FRAUD,
concealed, effect of, on limitation of actions, 71.
definition of, 187—189.
expression of opinion is not, 190.
liability of arbitrator for, 19.
liability of agent for, 32—33.
liability of directors and company promoters for, 188, 192, 195—196.
of agent, liability of principal for, 22, 38—39, 196—200.
mere non-disclosure is not necessarily, 190, 191.
representation must be false in itself, or misleading because combined with suppression of truth, 189, 190.
representation must be made with knowledge of falsehood, or in reckless disregard of truth, 188, 191, 192.
no action for, when defendant honestly believed statement to be true, 192.
not necessary to prove a corrupt motive of gain to defendant or a wicked motive of injury to the plaintiff, 192, 193.
of servants, liability of employer for, 32—33.
statement need not be made to the injured party, but must be made with intention that he should act upon it, 194.
must deceive him, and injury must be the immediate, not the remote, consequence of statement, 195.

FRAUDS, STATUTE OF, 29 Car. 2, c. 3, s. 4...193.

FURNISHED HOUSE, where action lies for breach of implied warranty in letting of, 191 note (*q*).

GESTURES are slander, not libel, if defamatory, 125, 126.

GRANT,
rights to water, acquired by, 84—85
support, acquired by, 87.
light, acquired by, 95, 96.

GUEST, injury to, 77.

HIGHWAY ACT (5 & 6 Will. 4, c. 50, s. 70)...75, 76.

HONEST BELIEF, no fraud where, 192.

HORSE, sale of, in market overt, 105.

HOUSE, liability for nuisance caused by non-repair of, 93

HUSBAND,
may be joined with wife in action against wife for tort committed during marriage, 8.
liability of, for torts committed by wife, 8—9.
what is necessary to constitute, 8.
for torts committed by him against wife's separate property, 9, 10.

IDENTIFICATION, doctrine of, 214—215.

IMMORAL WORK, no copyright in, 111.

IMPRISONMENT, false. See *False Imprisonment.*

INDEMNITY, between joint tort-feasors, when valid, 248.

INEVITABLE ACCIDENT, as ground of excuse, 15, 28, 29.

INFANT,
when liable for tort, 6.
may not take advantage of his own fraud, 7.
disability of, with regard to limitation of actions, 72, 249.

INJUNCTION,
interim, 172, 243.
to restrain nuisance, 91.
publication of libel, 172—174, 243.
when granted, 243, 244.
when damages given in addition or substitution for, 244.

INJURIA SINE DAMNO, 3.

INNS OF COURT, acts of, when privileged, 22, 23.

INNUENDO, 134.

INTEREST,
constituting privileged occasion, 157, 165—166.
as defence in action of maintenance, 123.

INTERRUPTION for less than a year no bar to prescription of right to light, 96.

JOINDER of husband in action for wife's tort, 8.

JOINT TENANTS, liability of, to one another, for trespass, 70.

JOINT TORT-FEASORS may be sued jointly or severally, 247.
contribution and indemnity between, 248.
measure of damages, when sued together, 240.

JUDGE,
privilege of, (1) in superior Court, 14, 18, 152—156.
(2) in inferior Court, 18, 19.
defamatory statements by, when on bench, absolutely privileged, 154.
province of, (1) in action for libel or slander, 131, 136—137, 158.
(2) in action for negligence, 206.
(3) in action for malicious prosecution, 183, 184.
(4) as to damages, 237, 241, 242.
liable for refusing bill of *habeas corpus* in vacation, 18.
bill of exceptions, 18.

JUDICIAL ACTS, as ground of excuse, 18—19.

JUDICIAL PROCEEDINGS,
defamatory statements in course of, absolutely privileged, 152—156.
reports of, conditionally privileged, 166—168.

JURISDICTION,
action for tort committed outside the, 246—247.
liability of magistrate acting outside his, 19, 155, 156.

JURY,
province of, in action for libel or slander, 132, 133, 136, 145, 146, 158.
negligence, 206.
malicious prosecution, 183—184.
as to damages, 237—242.
defamatory statements by, absolutely privileged, 153, 154.

JUS TERTII, 71.

JUSTICES,
proceedings before licensing, not absolutely privileged, 156.

JUSTICE OF THE PEACE,
everything said by, in office, absolutely privileged, 155.
privileges of, 19.
when liable for defamatory statement, 155.
liability of, when acting outside his jurisdiction, 19, 155, 156.

JUSTIFICATION as defence in libel or slander, 140, 141—143
See *Libel*.

LAND OF ANOTHER,
position of person injured on, 74—80.
recovery of, evidence in action for, 71.

LANDLORD,
when action of trespass is maintainable by, 68, 69.
liability of, for misfeasance in distraining, 73.
for damage caused by ruinous premises, 93.

LAW OF LIBEL AMENDMENT ACT, 1888...156, 158, 170, 171.

LAWFUL BUSINESS, right of person coming on, to safe condition of premises, 74, 78—80.

LEAVE AND LICENCE,
as ground of excuse, 15, 30, 31.
as defence to an action of trespass, 70.
for assault, 30, 31, 178.

LIBEL,
what is a, 125—134.
burden of proof on person who alleges that words are defamatory, 127, 128.
distinguished from slander, 125—127.
damage presumed in cases of, 126.
how to determine whether a statement is defamatory, 130—134.
injunction, Court may restrain publication by, 172—174, 243.
interim, how obtained, 172—174.
innuendo, where necessary, 134.
judge, province of, in actions for, 131, 136—137, 158.
jury, province of, in actions for, 132, 133, 136, 145, 146, 158, 164.
liability for repetition of, 139—140.
publication of, 134—138. See *Publication.*
repetition of, 139.
special defences in action for, 140.
justification, 141—143.
fair comment, 143—149. See *Fair Comment.*
privilege, 150—171. See *Privilege.*
apology, 171—172.
what plaintiff must prove where words are not defamatory in their ordinary sense, 132—134.
words must refer to some particular individual, 127, 128.
must affect plaintiff's character, or professional or trade reputation, 128, 129.
must refer to plaintiff himself, *ibid.*

LIBELLOUS WORKS, no copyright in, 111.

LIBERUM TENEMENTUM, defence an action for trespass, 7

LICENSEE,
definition of, 77.
position of, with regard to injuries suffered by, 74, 77

LICENSING JUSTICES, proceedings before, not absolutely privileged, 156.

LIGHT,
right to, 95—98.
how acquired, 95—96.
extent of, 96, 97.

LIGHT AND AIR, right to, a misleading phrase, 94.

LIMITATION,
Statutes of, 71, 249—251.
time runs,
(1) from commission of wrong, actionable *per se*. 250.
(2) from the actual injury where wrong only actionable on proof of special damage, 250—251.
time of, under Employers' Liability Act, 1880...51.
under Workmen's Compensation Act, 1906...65.
under Public Authorities Protection Act, 1893... 20—22, 250.
effect of various personal disabilities, 72, 249.

LOSS OF SERVICE,
action for, 116—117.
in seduction, 117, 119.
when servant dead, 228, 229.

LUNATIC,
disability of, generally, 11, 12.
with regard to limitation of actions, 72, 249.

MACHINERY, erection of, within twenty-five yards of carriageway illegal, unless concealed, 75.

MAGISTRATE, absolute privilege for defamatory statements made in office, 155.
liability of, generally, 19, 155, 156.

MAINTENANCE, 123.

MALICE,
in fact, 150, 170, 175, 182—183.
in law, 150—151.

MALICIOUS ARREST, 186.

MALICIOUS PROSECUTION,
action of, what plaintiff must prove in, 182—184
lies against a corporation, 11.
distinguished from false imprisonment, 184.

MARKET OVERT,
meaning of, 104.
effect of sale in, 103—105.

MARRIED WOMAN,
now under no disability with regard to limitation of actions, 249 note (*b*).
liability of, 7, 8.
may sue or be sued as *feme sole*, 8.
may sue husband in tort for protection of separate property, 9.

MARRIED WOMEN'S PROPERTY ACT, 1882 (45 & 46 Vict. c. 75)...8, 9, 249.

MASTER,
liability of, for servant's tort, 33—39.
fraud, 38.
to servant for injuries during service, 44—66.
when servant acts contrary to orders, 34, 35, 38.

MASTER AND SERVANT,
when action lies against third party for loss of service, 116—117.
relationship of, as affecting action for seduction, 117—119.

MATTER OF PUBLIC INTEREST, what is, 148, 149.

MAXIMS OF LAW,
"Actio personalis moritur cum personâ," 229.
"Omnia præsumuntur contra spoliatorem," 100.
"Sic utere tuo ut alienum non lædas," 216.
"Volenti non fit injuria," 31, 49, 50, 52.

MAYHEM, 178.

MEASURE OF DAMAGES,
province of judge and jury, 237.
circumstances to be considered, 237—240.
amount of damages, 236, 237, 240—242.
time of assessing damages, 242, 243.

MERCHANT SHIP, when master of, may use force, 178.

MERCHANT SHIPPING ACT, 1894...214.

MISREPRESENTATION, 187 *et seq.* See *Fraud.*
of agent, (1) liability of agent, 196.
(2) liability of principal, 196—200.

NATURAL CONSEQUENCES. See *Consequences.*

NECESSITY,
acts done of, as ground of excuse, 31.
as defence to an action for trespass, 69.

NEGLIGENCE,
definition of, 203.
contributory, 209 *et seq.* See *Contributory Negligence.*
extent of liability for, 201, 202.
knowledge of and acquiescence in, by workman a bar to action under Employers' Liability Act, 1880...49.
of companies under statutory authority, 24—25, 245—246.
province of judge and jury in action for, 206.
when defendant must prove that he was exercising due care, 207—209.
what plaintiff must prove in action for, 206—209.
when presumed in action for, 208, 209.

NEGOTIABLE INSTRUMENT, 102—103.
title to, can be acquired from person who has no title, *ibid.*

NEWSVENDOR, liability of, for libel in paper he sells, 139.

NON-DISCLOSURE, unless duty, not fraud, 190, 191.

NON-REPAIR, liability for damage due to, 93.

NORMAL RIGHT TO SUE, exceptions to,
personal disability, 5—13.
special circumstances, 14—31.

NOTICE OF ACTION,
under Employers' Liability Act, 1880...51, 52.
Workmen's Compensation Act, 1906...65.

NUISANCE,
abatement of, 70, 91, 245.
as defence to action for trespass, 70.
by reason of ruinous condition of premises, 93.
causing damage to property, 92.
personal discomfort, 92, 93.
definition of, 91.
light, as to, 97.
private, 91, 92.
public, 91.
remedies for, 91, 92.
that act is otherwise beneficial is no defence to indictment for, 94.
nor that plaintiff himself came to the nuisance, 94.

OCCUPIER,
liability of, for ruinous condition of premises, 93.
when action for trespass maintainable by, 68, 69.

OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM, 100.

OWNER, when action for trespass maintainable by, 68, 69.

PARENT,
right of, to exercise reasonable force and restraint, 23.
to chastise child, 23, 178.

PARLIAMENT, absolute privilege of debates in, 151, 152.

PARLIAMENTARY REPORTS, privilege of, 151—152, 158, 168—170.

PASSENGER, rights of, 182, 205—207, 214, 215, 226—229.

PATENT,
assignment of, 109.
Crown in relation to, 110.
definition, 108.
duration of, *ibid.*
grant of, *ibid.*
infringement of, 110, 111.
licences under, 109.
renewal of, 110.
revocation of, *ibid.*
specification, 108, 109.

PEACE. See *Public Peace.*

PERSON,
defence of, 178.
disability of, when beyond seas, 249.
injured, effect of death of, 228, 229—234.
liability for injuries to,
when entering premises on lawful business. 78—80.
when injured on land of another, 74—80.
limitation of action for wrongs to, 249.
private, powers of, to arrest, 181, 182.
wrongs to the, 177—186.

PERSONAL DISCOMFORT, in nuisance, 92, 93.

POISONOUS DRUGS, liability for, 222.

POSSESSION,
actual, 68.
constructive, *ibid.*
remedies where interfered with, 67, 99—101.

POWERS CONFERRED BY LAW, as ground of excuse, 15, 24—27.

PREMISES, liability for ruinous state of, 93.

PRESCRIPTION,
rights in regard to water acquired by, 82, 83.
to support acquired by, 87, 88.
light acquired by, 96—98.

PRINCIPAL AND AGENT,
liability of principal for misrepresentation of agent,
(1) when principal knows representation to be false, 196—198.
(2) when principal thinks representation to be true, 198—200.

PRIVILEGE,
of persons acting under statutory powers, 24—27.
exercising quasi-judicial powers, 22—23.
as defence to action for libel or slander, 140, 150—171.
is absolute (malice immaterial) in three cases, 151—157, which are :—
(1) parliamentary proceedings, 151, 152.
(2) judicial proceedings, 152—156.
(3) naval and military affairs, 156, 157.
is qualified (rebutted by proof of actual malice), 150, 157—171, in the following cases :—
I. Duty, 157.
A. Communication in pursuance of duty owed to society, 158—165.
α. Character of servants, 160—161.
β. Other confidential communications of a private nature, 161—162.
if volunteered, privilege not lost, 160.
presence of third parties does not necessarily destroy privilege, 163—164.
usual course of business does not destroy, 162.
unnecessary publication may destroy privilege, 165.
nature of the duty, 159.
B. Communications made in self-defence, 163—165.
α. To protect defendant's private interests, 164.
β. Provoked by previous attack, 164.
II. Interest—*i.e.*, communications to protect common interest, 150.
nature of, 165.
how lost, 166.

PRIVILEGE—*continued.*
III. Fair reports of proceedings, 168—171.
A. In Courts of Justice, 166—168.
common to individuals and newspapers, 167.
of *ex parte* proceedings, 167, 168.
B. In Parliament, 168—170.
C. In public meetings *by Law of Libel Amendment Act*, 1888, s. 4...170—171.
how lost, 169, 170.

PROBABLE CAUSE. See *Reasonable.*

PROBABLE CONSEQUENCES. See *Consequences.*

PROMISSORY NOTE, title to, acquired from person who has no title, 102.

PROMOTERS OF COMPANY, liability of, 188 (note), 195—196.

PROPERTY,
assault justifiable in defence of, 178.
wrongs to, 67—115.

PROSECUTION, malicious. See *Malicious Prosecution.*

PROXIMATE CAUSE, in cases of negligence, 201, 209—211.

PUBLIC AUTHORITIES PROTECTION ACT, 1893...20—22, 250.

PUBLIC CAPACITY, acts done in, privileged, 15—22.

PUBLIC INTEREST, matter of, what is a, 148—149.

PUBLIC OFFICER,
when liable for acts done in execution of process of law, 19, 20.
time within which action must be brought against, 249, 250.

PUBLIC PEACE, arrest justifiable in preservation of, 181.
assault justifiable in preservation of, 178, 179.

PUBLICATION of libel or slander, 134—138.
always necessary, 134.
what is, 134.
none by husband to wife, 136.
to wife concerning husband is, 136.
by mistake, accident, &c., 137, 138.
functions of judge and jury, as to, 136, 137.

PUFFS, of own goods by tradesman not actionable, 175, 176

QUARRY, if within fifty yards of highway, must be fenced, 75.

QUASI-JUDICIAL ACTS, when privileged, 22—23.

RAILWAY COMPANY,
liability of, for acts of servants, 35—37.
negligence of, 24—26, 35—37, 205, 207—208, 221, 226—229.

RAILWAY FIRES ACT, 1905...26.

RATIFICATION, only possible when act done on principal's behalf, 32.

REASONABLE AND PROBABLE CAUSE, in action for malicious prosecution, 183—184.

RECAPTION, 106.
as defence to action for trespass, 70.

RECOVERY OF LAND,
action for, 71.
time within which it must be brought, 72.

RE-ENTRY, peaceable, 72.

RELEASE, to one joint tort-feasor discharges the others, 247.
covenant not to sue one joint tort-feasor is not a, 247, 248.

REMEDIES,
different from criminal remedies, 2
judicial,
damages, 236—243.
injunction, 91, 172—174, 243—244.
extra-judicial, 245.

REMEDY of private person for infringement of special statutory duty, 24—27, 245—246.

REPETITION of libel or slander, liability for, 139—140.

REPLEVIN,
action of, 107—108.
where brought, *ibid.*
time within which to be brought, *ibid.*

REPORTS,
of parliamentary proceedings, privilege of, 168—170.
of judicial proceedings, privilege of, 166—168.
of *ex parte* proceedings, privilege of, 167, 168.
in newspaper of public meetings, when privileged, 170—171.

REVERSIONER, action for trespass can be maintained by, 68—69.

RIGHT,
in personam, infringed by breach of contract, 2.
in rem, infringed by tort, 1, 2.

RIGHTS OF COMMON, 80.

RIPARIAN PROPRIETOR,
rights of, 80—86.
over artificial watercourses, 82—83.
over natural streams—
above ground, 80—81, 85, 86.
below ground in clearly defined channels, 82.
where percolating, or in undefined channels, 83—85.
as to draining land, 85—86.

RUINOUS CONDITION OF PREMISES, liability for, 93.

RUINOUS HOUSE,
non-disclosure of state of, if let unfurnished, 191.
if let furnished, 191, note (*q*).

SALE OF GOODS ACT, 1893...103—105.

SALE OF GOODS IN MARKET OVERT, *ibid.*

SCIENTER, 220.

SEDUCTION,
action of, 117—120.
generally none by servant against master, 119—120.
See *Master and Servant.*

SELF-DEFENCE,
assault justifiable in, 178.
as ground of excuse, 31.
in libel and slander, 163—165.

SELF HELP, 245.

SEPARATE PROPERTY OF WIFE liable for her torts, 8, 9.

SERVANT,
who is to be deemed a, 39—40.
who is, within Employers' Liability Act, 1880...47.
within Workmen's Compensation Act, 1906...54.
how distinguished from independent contractor, 39, 55.

SERVANT—*continued.*
not necessarily liable for conversion on refusal to deliver goods on demand, 100—101.
liability of master for torts of, 33—39.
fraud of, 38.
injuries incurred by, during service, 44—46.
liability for torts committed on master's behalf, or by master's orders, 32—33.

SERVICE,
loss of, 116—117.
when presumed in action for seduction, 117—119.
no excuse for commission of wrong, 17, 32.

SHEEP, injuries to, by dog, 220.

SHIPS, collision between, Admiralty rule in cases of, 214.

SIC UTERE TUO UT ALIENUM NON LÆDAS, 216.

SLANDER. See *Libel.*
what is a, 125—127.
Court can restrain by injunction, 172—174.
how obtained, *ibid.*
period of limitation, 249.
repetition of, liability for, 139—140.
special defences in. See *Libel.*
special damage must usually be proved, 126, 138.
where damage presumed, 138—139.
of goods, 175—176.

SLANDER OF TITLE, 174—176.
essentials for action for, 175.
mere puff not, 175.
special damage must be proved, 174, 175

SLANDER OF WOMEN ACT, 1891...138—139.

SOLICITOR, privilege of, for defamatory statements, 153.

SOVEREIGN,
unlawful command of, no excuse, 17.
foreign,
can sue in English Court, 12—13.
exempt from civil proceedings unless privilege waived, *ibid.*

SPECIAL DAMAGE, what is, 138.
when of the gist of the action, 4, 250—251.

SPRING GUNS,
illegal, save in dwelling-house by night, 75.
trespasser wounded thereby can maintain action, *ibid.*

STATE, ACT OF,
as ground of excuse, 14, 15—18.
none between sovereign and subject, 16.
when causing annexation, *ibid.*

STATUTE,
limitation of action against person acting under, 20—22, 250.
protection to person acting under, 20—22, 250.
how far a defence to action for nuisance, 26—27.
effect of remedy given by, on party injured by breach of, 24—27, 245—246.
where no remedy given by, position of party injured by breach of, *ibid.*
effect of discretionary power conferred by, 27.

STATUTES OF LIMITATION, 71, 249—251.

STOLEN PROPERTY, effect of conviction of thief on ownership of, 103—105.

SUPERIOR COURT,
definition of, 18.
privilege of judges of, 14, 18, 152—156.

SUPPORT, RIGHT TO,
independent of negligence, 88.
of land unweighted by buildings, 86—87.
weighted by buildings, how acquired, 87—88.

TENANTS IN COMMON, liability of, to one another, for trespass, 70.

TENTERDEN'S (LORD) ACT (9 Geo. 4, c. 14), 193.

THIEF, effect of conviction of, on ownership of stolen property, 103—105.
can sometimes give good title to stolen property, 102—105.

TITLE,
to chattels personal cannot as a rule be acquired from person who has no title, 102.
exceptions to above rule, 102—105
to goods, when judgment affects, 105

TORT,
definition difficult, 1.
practical description, 1.
distinguished from crime, 1—2.
breach of contract, 2.
breach of certain personal relations, 2.
founded on contract, 226—229.
committed abroad, when actionable here, 246—247.
newness of, no objection to action, 2—3.
method of proceeding where tort is also a crime, 226—233.

TORT-FEASOR, effect of death of, 229, 230, 235.

TRADE DISPUTE, definition, 122, 123.

TRADE DISPUTES ACT, 1906...13, 120, 122, 123.

TRADE MARK,
definition of, 112.
essentials of, 112—113.
registration, 113.
effect of, *ibid.*
property in, 113, 114.

TRADE NAME, nature of, 114, 115.

TRADE UNION, not liable in tort, 13.

TRAP, concealed, 77.

TRESPASS,
to land,
definition of, 67.
damage need not be proved in action for, *ibid.*
when action maintainable for, 67—69.
remedies for, 67, 71—72.
time within which action must be brought, 72—73.
who may bring action for, 68—69.
defences to action for, 69—70.
jus tertii, a defence only, 71.
trespass *ab initio*, 72—73.
distress, 73.
to goods,
definition of, 98.
distinguished from conversion, 99.
who may sue for, 106.
remedies for, 106—107.
on the case, action of, 106.

TRESPASSER,
ab initio, 72—73.
injury to, liability for, 74—76.
expulsion of, 67, 72.

"TRESPASSERS WILL BE PROSECUTED," effect of notice, 73—74.

TROVER, action of, 106, 107.

TRUTH,
as defence to an action for libel or slander, 140, 141—143.
to a prosecution, 141, note (*l*).

UNIVERSITIES, acts of, when privileged, 22—23.

VALUER, is liable for negligence, 19.

VINDICTIVE, OR EXEMPLARY, DAMAGES, 237, 240.

VOLENTI NON FIT INJURIA, 31, 49, 50, 52.

VOLUNTEER, liability for injury to, 46.

WARRANT,
justice's protection of constable acting under, 19, 20.
as justifying arrest, 180.

WASTE,
definition of, 88.
who are liable for, 90.
voluntary, 89.
permissive, *ibid.*
legal, *ibid.*
equitable, *ibid.*

WATER,
flowing through, or under, land, rights with regard to, 80—86.
drawing off, 85, 86, 87.
fouling, 85.
percolating, rights with regard to, 84—85.
escape of stored, liability for damage caused by, 216—217.

WATERCOURSES,
natural, 80—82, 83—85.
artificial, 82—83.

WIFE,
torts by, 7—9.
torts against, 9.
by husband, *ibid.*
liability of husband for torts of, 8, 9.

WINDOWS, existing right to light not lost by alteration of, 98.

WIRE, barbed, when a nuisance, 76.

WITNESS, absolute privilege of, 153—155.
limits of, 154.

WOMEN, slander of, 138—139.

WORKMAN,
definition under Employers and Workmen Act, 1875...47.
under Workmen's Compensation Act, 1906...54.
rights of, (1) at common law, 44—46.
(2) under Employers' Liability Act, 1880...46—52.
(3) under Workmen's Compensation Act, 1906... 52—66.

WORKMEN'S COMPENSATION ACT, 1906...43, 44, 52—66, 234.

WRONGDOER,
ratification by principal, 32.
effect of death of, 229—230, 235.
liable for natural and probable consequences of acts, 237.
liable, in some cases, for special consequences, 237—238.
motive of, may be taken into account, 239—240.

WRONGDOERS,
all, are principals, 247.
no contribution between, 248.
joint, may be sued jointly or severally, 247.
release to one releases all, *ibid.*
but not a covenant not to sue, 247—248.
indemnity between, when valid, 248.

THE END.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.